A

TREATISE

OF

SPOUSALS,

OR

Matrimonial Contracts:

WHEREIN

All the QUESTIONS relating to that Subject are ingeniously Debated and Resolved.

By the late Famous and Learned

Mr. *HENRY SWINBURNE*,

Author of the Treatise of *Wills* and *Testaments*.

556.30

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TO THE
READER.

I *Need not ſpend much time (I hope) in recommending this Treatiſe to Publick peruſal; 'tis ſufficient, I ſuppoſe, to give it a Reputation in the World, when I aſſure you, that it was compoſed by the Learned and Ingenious* Mr. Henry Swinburne, *Author of the Treatiſe concerning laſt* Wills and Teſtaments. *If any Man ſhould queſtion the Truth of this, I dare appeal to his own Judgment, after he has conſiderately peruſed ſome few Leaves of the enſuing Diſcourſe, whether the exactneſs of the Method, the plainneſs of the Style, the familiar and eaſie way of Arguing, the pertinency of the Marginal Quotations for proving of every Point of Law that he aſſerts or lays down (as the peculiar cuſtom of that Author was) do not ſufficiently convince him, that the Treatiſe of* Wills, *and this of* Spouſals *were pen'd by one and the ſame Hand: But, if occaſion required, the Rea-*

der might be yet more fully ſatisfied by the Original Manuſcript, all writ by Mr. Swinburne's *own Hand, which is yet extant, and may take away all poſſibility of queſtion or ſcruple.*

The Subject of this Treatiſe is a matter of the higheſt moment and importance, the Queſtions and Difficulties, that ariſe about it, are of the greateſt Variety and Niceneſs, and the frequent occaſion there may be, for the Matters here diſcourſed of and debated, to fall out in Practice, cannot but render the Treatiſe uſeful, as well as pleaſant, and by conſequence very acceptable. 'Tis poſſible at the firſt ſight ſome Men may imagine, that Spouſals *are now in great meaſure worn out of uſe, and by conſequence that Diſcourſes of that Nature can yield little or no benefit to the Reader. But to this I anſwer, That the Rules concerning* Spouſals *are for the moſt part as well applicable to* Marriage *as them, and that there is no difference in Subſtance betwixt.* Spouſals de præſenti *(which make up a principal part of this Book) and* Matrimony, *only the Publick Office, and greater Solemnity of the Act, together with the Benediction of the Miniſter, are by Law requiſite to compleat the Matrimony, before it be capable of thoſe Legal Effects of Dower and Legitimation of Iſſue. But in* foro con-

conſcientiæ *they are as much Man and Wife, as if all Legal Requiſites and Solemnities had been performed. Nay, as to ſome Legal Effects alſo, a Contract* de præſenti *has the ſame force that a lawful* Marriage *has; for the Contract is indiſſoluble ſo long as the Parties live; and if either Party ſhall after ſuch Contract attempt to marry elſewhere, that* Marriage *is null and void* ratione præcontractûs, *as much as if the Parties contracting had been lawfully married together; and the Parties marrying elſewhere, after ſuch Contract made, are to be Divorced, and the Perſons contracting may by Courſe of Law be compelled to Solemnize* Matrimony *according to the Rites and Ceremonies of the Church. And beſides, in all* Marriages *Solemnized after the moſt ſtrict manner, the Contract of the Parties is the principal Ingredient and moſt eſſential Part, all other Matters being only as it were Foreign and Extrinſical to its Nature; although (I muſt confeſs) Divine Invocation and the Miniſter's Benediction have ever in all Ages been accounted neceſſary to its right Celebration and Performance. So that 'tis plain the moſt difficult Caſes that can relate to* Marriages *muſt be conſidered of and diſcuſſed under this Head of* Contracts *or* Spouſals.

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In ancient Times Spousals *did regularly precede Marriage*, Nam Mos fuit Veteribus Stipulari & Spondere sibi Uxores futuras, l. Sponsalia 2. ff. de Sponsal. *And in some places the Woman, after these* Spousals, *presently cohabited with the Man, but continued unknown till the Marriage-day. In our Publick Office of Marriage,* Spousals *and* Matrimony *are united, and performed in one continued Act; When the Minister demands,* Wilt thou have this Woman to thy wedded Wife, *&c. And the Man answers,* I will, *and so the Woman* vice versâ, *there's a* Specimen *of* Spousals de futuro. *When the Man repeats the Words,* J. N. take thee N. to my wedded Wife, *&c. and so the Woman* vice versâ, *there's the form of* Spousals de præsenti, *which in Substance are perfect Matrimony, (as I said before) though not as to all Legal Effects. When the Minister adds his Benediction, and pronounces them to be Man and Wife, then 'tis a perfect* Marriage *to all constructions and purposes in Law.*

It may possibly be wondered at, that a Piece of this Nature, treating upon so rare and useful a Subject, & pen'd by a Person of that Fame in the World, should lye so long conceal'd, and never in all this time be committed to the Press. But

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then it is to be conſidered, that Manuſcripts of this Nature commonly fall into the Hands of Men of the ſame Profeſſion, and theſe commonly preſerve them for their own private uſe, and think it not their Intereſt to communicate that Knowledge at ſo eaſie a Rate, which perhaps, has coſt them many years Study and Experience, and no ſmall Charge in Underſtanding and Attaining to. Nay, ſome go ſo far as to think, that the fewer Books there are publiſhed of their Profeſſion, the more Advantage it will ſtill be to the Practitioners, ſeeing Men will be then neceſſitated upon every Point to have recourſe to Counſel. But as to the firſt, Certainly the Publick Advantage ought in all reaſon to be preferred before any Man's Private Utility, which is too mean a thing to ſtand in competition with it: The Benefit that may redound to the Generality of Men by its Publication, will in reaſon far out-weigh the Private Profit, that any Perſon may get or propound to himſelf by its Concealment and Suppreſſion. And, as to the ſecond, Certainly it is the Honour, and muſt be the Advantage of the Profeſſion, to have Men of Senſe write Books, and make it Eaſy and Intelligible. Men commonly have a kindneſs for what they know and underſtand; and on the contrary, that which they are

are not verſed in, and cannot attain without great Pains and Difficulty, they are apt to deſpiſe and hate: I am ſo far from thinking it the Intereſt, that I take it to be a manifeſt Injury and Misfortune to ſo Ingenious a Study and Profeſſion, to be kept conceal'd, and the Knowledge of it confin'd to ſo few Hands, we ought in all reaſon to expect and preſume, that the more 'tis known, and the juſtice and reaſonableneſs of its Rules conſidered, the more it will be courted and admired, and the Practice advanced and enlarged; that ſtrength of Reaſon, and variety of good Learning, accompanied with thoſe great Advantages of Method and Style, with which the Books writ in that Science do generally abound, will, when they are well known and weighed, rather, in all probability, force its Reception and Entertaiment even amongſt Men, whoſe Intereſt it is to ſuppreſs and keep it low, much more among Perſons diſintereſſed and unbyaſſed, and make it flouriſh in deſpite of oppoſition.

I have been credibly enformed, That the worthy Author of this Diſcourſe had a deſign to oblige the Publick, by writing three Treatiſes, *upon three ſeveral Subjects, which were look't upon as the Principal, and moſt conſiderable Mat-*

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ters belonging to the Cognizance of the Eccleſiaſtical Courts *of this Realm: The firſt concerning* Wills *and* Teſtaments; *The ſecond concerning* Marriages; *The third concerning* Tithes; *And, had he liv'd to have accompliſh't his Deſign, no doubt he had cleared many Queſtions relating to thoſe Matters, which at preſent are not ſo generally known, or throughly underſtood, but labour under great Obſcurity. The firſt of theſe he liv'd to finiſh and ſee publiſh'd; and all men grant it to be an excellent Piece in its kind, and has acquired him no ſmall Fame amongſt Poſterity. This indeed was a Subject properly belonging to him, and wherein he may well be ſuppoſed to be very converſant and knowing, he having been Judge of the* Prerogative Court *at* York *for many years before he dyed; which Place he executed with great Integrity and Applauſe. After his Death his Friends Erected a fair* Monument *to his Memory in the* Cathedral Church *of* York, *where he lyes Interr'd, with this Epitaph or Inſcription.*

Non Viduæ caruere Viris, non Patre Pupillus,
Dum ſtetit hic Patriæ, Virque Paterque ſuæ.

Aſt, quod *Swinburnus* Viduarum ſcripſit in uſum,
Longiùs æterno Marmore vivet opus.

The ſecond, concerning Marriages, *he deſigned to have divided into three Parts. The firſt whereof was to treat of* Spouſals; *The ſecond of* Marriages; *The third of* Divorces. *The firſt of theſe Parts he liv'd to finiſh, as may be ſeen by peruſing the enſuing* Treatiſe. *But as to the two laſt Parts, and his Piece of* Tithes, *he only left ſome rude Materials, not formed or digeſted into any Method or Order. And 'tis not improbable but that they, in whoſe hands the Manuſcript ſo long remained, might think it an Injury to the Authors Memory, to commit a Piece to the Preſs, which remained unfiniſhed and imperfect, and wanted the Authors laſt Hand at his Death. But though the Piece be imperfect in reſpect of what the Author deſigned, yet this particular Tract concerning* Spouſals, *being abſolutely finiſhed, and the Subject very delightful and pleaſant: And conſidering that no Engliſhman (that I know of) has put forth any thing material of this Nature before, and that there is nothing which could be writ by ſuch an Author, ſpecially relating to his own*

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Profeſſion, but what very well deſerved to be read, and muſt be very enforming, I thought the publiſhing of it might be very pardonable, if not obliging and grateful. And 'tis poſſible that the printing of this Piece, may provoke and engage ſome ingenious Pen of the ſame Profeſſion to begin where the Learned Author left off, and happily to finiſh and perfect, what he lived not to perform.

Some Perſons of Critical Diſpoſition, may perhaps cenſure our Author, for being oftentimes too elaborate, and ſpending over much time in reſolving Queſtions, which at the firſt ſight, and even to a mean Capacity may ſeem very eaſy and trivial, and in which there can be little or no difficulty, and think that his Style is too prolix and tedious, and that in ſome places he ſeems too pedantick, &c. But to this I ſay, That the Author deſigned this Treatiſe, *as formerly he had done that of his* Wills *and* Teſtaments, *for the benefit and Inſtruction of the meaner Sort. If he had writ for Fame and Oſtentation, or for Satisfaction of the Learned, and ſuch as were well verſed before hand in the Profeſſion, he knew as well as any man, how to have applyed himſelf to them in a more ſuccinct and conciſe way, and to have talk't to them in their own*

Terms of Art, and ſuch as were proper to the Profeſſion; and this would have been much more eaſy and leſs trouble to him; but it would have rendred the Treatiſe *in great meaſure uſeleſs to the generality of People, for whoſe Benefit he chiefly intended it. And beſides, many* Grains *of Allowance are to be given him, in reſpect of the Age in which he writ, which was fuller of Affectation, and far leſs Polite and Accurate than the preſent. We find Scraps of Latin, much leſs to the purpoſe, and much more Pedantry and Affectation uſed, by a Man of great* Fame *and* Worth *in another Profeſſion, who lived many years after our Author, and had many more Advantages of Converſation and Improvement. And I make no queſtion but that the pertinency and cloſeneſs of our Author in moſt places, will ſufficiently compenſate, and make an Attonement for his* Prolixity *or* Affectation *in others.*

The way that he uſed in quoting his Authority for every Point of Law that he deliver'd, is fair and candid (however it may ſeem to ſome Perſons ſuperfluous) and may be of ſingular uſe to thoſe that ſtudy the Profeſſion, eſpecially to young Practitioners, there being ſcarce any Queſtion, that can occur, relating to Spouſals *or* Matrimonial Contracts, *that is not here-*

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ingeniouſly debated, and judiciouſly reſolved; and then he that deſires more ample Satisfaction, is directed how he may conſult thoſe Authors, from whence this Judgment was drawn and collected, and where he may find the Matter much more amply diſcuſſed, and receive all the Satisfaction he can deſire.

In ſhort, I hope, that Care has been taken in the Impreſſion, that the Piece may do due Service to the Publick, and no Injury to the Memory of the Author, and that is all I aim at in the Publication.

THE

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OF

OF SPOUSALS.

SECT. I.

Of the manifold ſignification and acceptation of this word Sponſalia, Spouſals, *and whence it is derived.*

1. ALbeit this word *Sponſalia* (Engliſhed *Spouſals*) being properly underſtood, doth only ſignifie Promiſes of future Marriage (*a*), yet is it not perpetually tied to this only Senſe, for ſometimes it is ſtretched to the ſignification of *Love Gifts and Tokens* of the Parties betroathed (*b*); as *Bracelets, Chains, Jewels,* and namely the *Ring* (*c*); being often uſed for the very *Arrabo* or aſſured Pledge of a perfect Promiſe (*d*): Sometimes it is taken for the *Portion of the Goods* which is given for and in conſideration of the Marriage to be Solemnized (*e*); and ſometimes for the *Feaſt or Banquet* at the Celebration of the Marriage (*f*), and of others it is otherwiſe uſed (*g*).

(*a*) l. 1. de Sponſal. ff. Panor. & Felin. in rub. de Sponſal. ext. Covar. de Sponſ. prima parte c. 1. nu. 4. in fine.

(*b*) L. 1. C. ſi Nupt. ex reſcript pet. l. Deo nobis C. de Epiſ. & Cler. Covar. d. c. 1. nu. 2. Alciat. pererg. l. 1. c. 2. in fine.

(*c*) Anto. Gubert. Coſtan. Tract. de Sponſal. c. 2. nu. 12. Plin. lib. 33. c. 1. (*d*) Geneſis 24. v. 22. c. 38. v. 18. c. noſtrates, 30. q. 5. Covar. Tract. de Sponſ. ſecunda parte, c. 4. nu. 4. Maſcard. Tract. de probat concl. 100. DD. in c. fin. de deſponſ. impub. extra. (*e*) Lib. 1 Reg. c. 18. v. 25. Covar. Tract. de Sponſ. prima parte, c. 1. n. 2. (*f*) Cicer. lib. 2. Epiſt. ad Quintum fratrem. Anto. Gubert. Coſtan. Tract. de Sponſal. c. 2. n. 3. (*g*) V. Gubert. Covar. & Alciat. ubi ſupra.

2. Our Temporal Lawyers they do uſually confound theſe Terms of *Eſpouſals and Marriage*, uſing them *promiſcuè*, or one for another (*h*), yet do not they confound the Natures with the Names; for until the *Celebration* of the Marriage, they do not repute the affianced Couple for one Perſon, nor deem of their Iſſue as lawful, nor doth he gain any Propriety in her Goods, nor ſhe any Dower in his Lands by force of the *Contract of Matrimony* only without *Solemnization* (*i*).

(*h*) Fitz. Abridg. tit. Baſtardy. Brooke eodem tit. *& paſſim alij Autores* Angl. *plus minùs locus, Quamvis communis uſus loquendi* Franciæ, *unde leges noſtræ municipales jam diu ortæ ſunt, diffe-rentiam faciat inter* fiancée *&* mariée, Rebuff. in l. pronunciat. §. Matres Familias de verb. ſignif. ff. *Id quod Theoloſanis (inquit) prodeſt ſcire, quippe qui lucrantur dotem nuptæ præmorientes, ſed non Sponſæ, ita videlicet Statutente eorum Conſuetudine, noſtris legibus non admodum diſſimili.*

3. The Civilians, though ſeldom they uſe the word *Spouſals* for Matrimony (*k*), but rather for a *preamble or preparation* thereunto (*l*), making no leſs difference betwixt Spouſals and Matrimony, than betwixt the Promiſe and the Performance of the Act (*m*); yet both the Civilians and Canoniſts in favourable Caſes generally (*n*), in matters indifferent, often, and ſometimes in ſtrict and penal Caſes (*p*), deem of *Spouſals* like as of pure and perfect Matrimony.

(*i*) Perkins tit. Feoffments fol. 40. v. Rebuff. in l. pronunciatum. §. Matrem familias. de verb. ſign. ff. *referente, Theoloſanos lucrari dotem præmorientes nuptæ, ſed non Sponſæ.* Vid. Kirchovium Theſaur. com. op. verb. Sponſus. (*k*) l. 1. de Sponſal. ff. & DD. ibidem. (*l*) Sichard. in rub. de Sponſal. C. n. 3. Weſemb. in tit. de Sponſ. ff. Tiraq. in l. 14. de leg. connub. Socin. Jun. conſ. 30. vol. 2. nu. 5. (*m*) Doctores in l. ſi quis Officium. De ritu nupt. ff. & in l. ſolet. de his qui not. infam. ff. Jo. Frigeus de Spouſal. in fine Inſt. *quibus (ſi placeat) velim adhibeas.* Theod. Beza, Tract. de divortiis in prin. (*n*) Sichard. in rub. de Sponſal. C. nu. 10. l. non ſine C. de bon quæ lib. Tiraq. de leg. connub. l. 14. verb. neque. v. Kirkhov. Theſaur. com. op. verb. Sponſus in fin. Anto. Gubert. Tract. de Sponſ. fol. 16, n. 12, 13, 14. (*o*) Peck. Tract. de teſt. conjugum. l. 4. c. 11. n. 4. l. Seia. l. cum hic Status §. pen. ff. de donat. inter virum & ux. Panin. c. 3. de præſumpt. extra in fine & ibi Felin. nu. 4. Summa Silveſt. verb. Sponſalia q. 1. in fine. (*p*) Bart. in l. cum Pater ff. de paricid. Soarez Theſaur. com. op. litera S. nu. 158. Julius Clarus §. Adulterium nu. 9. ſc. *quia eadem ratio in utroque caſu militet*, Rebuff. in l. pronunciatum, §. Matrem Familias ff. de verb. ſign. v. And. Gail. pract. obſ. lib. 2. obſ. 80.

(*q*) Ut per tot. tit. de Sponſal. & Matrimoniis extra.

4. The Canoniſts be ſomewhat more diligent indeed in the Obſervation of Terms; for they do not only diſtinguiſh between Matrimony and Spouſals (*q*), but de-

deſcending further, they do alſo diſcern betwixt one kind of Spouſals and another, being the firſt Inventors of the ſeveral Names of Spouſals *de futuro*, and Spouſals *de præſenti* (*r*), and yet nevertheleſs oftentimes they make no difference, or very little, betwixt the Natures and Effects of Spouſals *de præſenti*, and of Matrimony ſolemnized and conſummate (*s*).

(*r*) c. pen. de Sponſ. extra Covar. de Sponſ. prima parte c. 1. n. 4. Schneid. Tract. de Nupt. fol. 18. Q. quot ſunt ſpecies.

(*s*) c. Per tuas. *Qui filii ſunt legitimi extra.* Felin. in rub. de Sponſ. extra. Gl. in Clem. unic. de Conſang. Covar. tract. de Sponſ. prima parte c. 1. n. 2, 3, 4. Hiero. Schurff. inter conſil. matrimon. conſil. ibidem 24. *Imò nihil videntur Sponſalia de præſenti, quàm matrimonium initiatum.* Vigel. method. juris Pontif. fol. 792. Adde Panor. in rub. de Sponſal. extra. *ubi in favorabilibus etiam Sponſa de futuro.*

5. Thus is this word *Spouſalia*, *Sponſals*, diverſly uſed, though properly and naturally (as I firſt ſhewed) it ſignifieth nothing elſe but Promiſes of future Marriage (*t*); and it is derived of the Verb *Spondeo*, which is to promiſe (*u*): and hence it is that the Parties betroathed or affianced (not yet married) are called *Sponſus & Sponſa*, that is to ſay, *promiſed*, being ſo called *Sponſi*, promiſed (*x*) rather than *Spondentes*, or *Sponſores*, promiſing or promiſſors, becauſe in former Ages (as ſome probably do conjecture) ſuch was the Authority of Parents, and ſuch the Obedience of Children, as the Parents did make Promiſes of their Children's Marriage, and not the Children themſelves (*y*), who neither could (*z*), neither would, without their Parents conſent, preſume to make any kind of Promiſe concerning Marriage; much leſs to proceed to the actual Celebration and Conſummation of Marriage, without the Parents liking (*a*), being contrary to the wicked Examples of curſed Children in theſe days, thereby diſhonouring their Parents, and breaking the Commandment of the Almighty.

(*t*) Covar. Tract. de Sponſ. prima parte, c. 1. n. 4. Pan. in Rub. de Sponſ. extra. Tiraq. de Leg. Connub. l. 14. verb. neque huic. Horatio ff. de Sponſal.

(*u*) l. 2. ff. de Sponſal.

(*x*) l. 3. ff. de Sponſal.

(*y*) Alciat. parerg. lib. 1. c. 2. *Et ſpondere dicebatur Pater filiæ, deſpondere autem Pater adoleſcentis.* Teſte Brecheo in l. Sponſio ff. de verb. ſignif.

(*z*) Hiero. Franc. in l. nuptias de Reg. Jur. ff. n. 11. Alciat ubi ſupra; *quod verum puta, inſpecto jure Civili, ſecus Jure Canonico aut infra.*

(*a*) De conſenſu Parentium, v. Schneid. Tract. de Nupt. fol. 36. cum ſeqq. & Melch. Kling. Tract. de Cauſ. Matrimonial. fol. 77. & infra.

6. The Verb *Spondeo* (by the Opinion of *Varro* (*b*) and others (*c*), is as much as *Sponte do*, that is, to give freely or without conſtraint, inſinuating thus much, That how great ſoever the Authority of Parents is in that behalf, yet the Children or Parties promiſed or eſpouſed, are to give their conſent freely and voluntarily; or at leaſt, that they are not to be conſtrained thereunto againſt their Wills, by the rigor of covetous Parents (*d*), or by any other ſiniſter means (*e*); otherwiſe the Contract of Spouſals or Matrimony, made through fear, is utterly void *ipſo jure* (*f*).

7. Finally, whereas the word *Sponſalia*, *Spouſals*, doth want the ſingular number, we may collect, That the ſingle Promiſe (*h*) of either Party alone doth not make Spouſals, as in the approaching Definition more fully doth appear.

(*b*) Lib. 4. de Ling. latin.

(*c*) Rebuff. in l. munus, de Verb. Sign. ff. Weſemb. in tit. de Sponſal ff.

(*d*) L. filio familias. l. Sponſalia, de Sponſal. ff. c. cum locum, de Sponſal. extra.

(*e*) L. non cogitur, ff. de ritu nupt. d. c. cum locum. Et ibi DD. Gail. l. 2. pract. obſ. 93. obſ. Everard. conſil. 19. Jo. Frigeus Tract. de Sponſ. in fine. Inſt. f. 264.

(*f*) c. 1. de Deſponſ. Impuberum, c. cum locum, & c. cum veniens. el. 2. de Sponſal. extra. & ibi Panor. l. 1. conſil. Matrimonial. conſil. ibidem 15. nu. 13. Andr. Gail. Pract. obſerv. l. 2. obſerv. 95. Reuſner. de Cauſ. matrimo. qu. 6. Menoch de præſump. l. 3. præſump. 129. & de Arb. Jud. Caſ. 138.

(*h*) *Unde Vocabulum Sponſio de omni ſtipulatione, promiſſioneque, etiam nulla interrogatione prævia univocè prædicatur*, L. Sponſio ff. de verb. ſign. *Et ibi DD. ſed dictio Sponſalia propriè ſumpta, ad nuptias tantùm refertur*, L. 1. ff. de Sponſal.

SECT.

SECT. II.

The Definition of Spouſals.

1. SPouſals are defined after this manner, *Sponſalia ſunt mutua repromiſſio futurarum Nuptiarum, ritè inter eos, quibus jure licet, facta* (*a*). Spouſals are a mutual Promiſe of future Marriage, being duly made between thoſe Perſons, to whom it is lawful. In which definition I obſerve three things eſpecially: *One*, That this Promiſe muſt be mutual; *Another*, That it muſt be done *ritè*, duly: *The laſt*, By them to whom it is lawful.

(*a*) c. noſtrates 30. q. 5. l. 1. de Sponſal. ff. Junctis Weſemb. in eund. tit. nu. 2 & Moraldo. Tract. de Matrim. tit. de Sponſal. in prin.

2. Firſt, whereas this Promiſe is deſcribed to be *mutual*, it proveth that it is not ſufficient if either of the Parties alone do promiſe (*b*): And therefore if the Man (for Example) ſay to the Woman, *I do promiſe that I will marry thee:* But the Woman doth not make the like Promiſe to the Man; or contrariwiſe, the Woman doth promiſe, but not the Man, this is a lame Contract (having as it were but one Leg) and ſo not being able to walk upright, is not of any force in Law (*c*): Neither is the ſilent Party in this Caſe preſumed to conſent, unleſs the conſent appear, either by words, or at leaſt by ſufficient Conjectures (*d*). As when the Father or Mother do contract Sponſals, or promiſe Marriage for their Child; for the Childs ſilence in this Caſe (being preſent and hearing the ſame) is taken for a conſent and approbation thereof (*e*); though it be other-

(*b*) c. ſi inter. c. tua nos. de Sponſal. c. debitum. de bigamis c. 1. de Sponſa duorum extra.

(*c*) Præpoſit. & alii in d. c. ſi inter. & in c. 1. de Sponſa. duorum extra. l. 1. Conſil. Matrimon. conſil. ibidem 84. nu. 4. & lib. 2. conſil. ibidem 4. n. 1. & conſil. 5. nu. 1. in fine. v. addit. ad Hoſtiens. Sum. in tit. de Sponſal. §. quot ſint.

(*d*) Lib. 1. Conſil. Matrimon. conſil. ibidem 84. nu. 6. Pan in c. tuæ de Sponſal. & in c. 1. de Deſponſ. impub. extra. l. 2. conſil. Matrimon. conſil. ibidem 34. n. 34. verſic. 3. (*e*) c. 1. §. fin. de Deſponſ. impub. in Sext. junctâ gl. ibidem, quod tamen intellige, ut per Felin. poſt Abb. in c. nonne. de præſumpt. extra n. 8.

wiſe,

wise, if any other Person than the Parents take upon him to speak, or answer for the Party; for there the Parties silence doth not prove any consent at all (*f*).

3. Secondly, Whereas this Promise is to be done *ritè*, duly, we are to consider that this word *ritè* being strictly understood hath relation only to the Formalities of the Act or Contract (*g*); but being understood in a more ample signification, it comprehendeth whatsoever is included within the compass of the word *rectè*, namely whatsoever doth respect the Justice and Equity of the matter (*h*). In this definition it seemeth to comprehend both the one and the other, and so this Promise of Marriage must not only be *formal*, but *just and right* also (*i*).

(*f*) Innoc. Archid. Jo. And. & Phil. Franc. in d. §. fin. *quorum opinio communis est* —— teste Covar. Tract. de Sponsal. secunda parte c. 4. nu 7.

(*g*) Bart. in l. 2. de inoff. test. ff. Cardin. in Clem. Testibus. de Testibus Alciat. & Rebuff. in l. *hæc verba in stipulatione.* de verb. sign. ff. Si certum pet. ff.

(*h*) *Lucas de Penna in l. si quando de bonis vacan.* lib. 10. C. Decius in l. lecta. n. 22. Alciat. in eandem l. nu. 27. in fine.

(*i*) L. semper de ritu Nupt. ff.

4. Concerning the Form, so precise were the ancient Romans in the observation thereof, that they did not for a long time admit any other manner of contracting Spousals, but by *stipulation* (*k*); that is to say, by a certain conception of words consisting of Question and Answer (*l*): For Example, The one Party asking, *Wilt thou marry me?* The other answering, *I will* (*m*). Nevertheless, forasmuch as it is the Consent alone of the Parties whereby this Knot is tied, and whereby this *Despensation* or *Affiance* is sufficiently wrought (*n*), being the very Substance (and as it were the Life and Soul) of this Contract (*o*); therefore the necessity of observing that former prescript Form of Stipulation was not without just Cause abolished (*p*), and liberty granted to

(*k*) L. 2. de Sponsal. ff. Anto. Gubert. Tract. de Sponsal. c. 2.

(*l*) Inst. de verb. Oblig. in prin. Spiegel. Lexic. verb. Stipulatio.

(*m*) Sichard. in Rub. de Spons. C. nu. 9.

(*n*) L. 4. de Sponsal. ff. c. sufficiat. 27 q. 2. c. cum apud de Sponsal. extra.

(*o*) d. l. 4. de Sponsal. ff. & ibi DD. Summa Host. tit. de Matrimonio §. qualiter paulò post prin. Socin. consil. 28. vol. 1.

contract

contract Spousals by whatsoever form of words (*q*), or by any other means, as *Writing*, *Signs*, *Tokens*, &c. (*r*) whereby this mutual Consent might appear; and so at this present, there is no one *Form* of *Desponsation* more lawful than another, but it is sufficient if the Consent of the Parties do appear by any form (*s*).

5. Concerning the *Justice and Equity* of Spousals (if we shall extend this word *ritè* so far) (*t*) we may learn That seeing the same must be just and right as well as formal, all unjust and wrongful means and causes thereof, as *Violence* (*u*), *Threats* (*x*), *Fraud* (*y*), with such sinister Practices and Errors likewise are excluded.

6. Thirdly, By these words of the Definition [*inter eos, quibus jure licet, facta*] made between those Parties to whom it is lawful, we may easily collect, That it is not lawful for every person to contract Spousals, namely, not for *Infants* before they be *Seven* years old (*a*); nor for any Person prohibited to contract Matrimony (*b*), as they which be of *Kin* within the Levitical Degrees (*c*), and such as be already married (*d*), with many Persons more ranged in a more ample Field than is here allowed to conduct them.

(*q*) Summa Host. de Sponsal. §. qualiter. Inst. jur. Can. eodem tit. §. 1. *quod tamen non sic intelligendum est, ac si interim non liceret, per stipulationem contrahere*, Azo. in d. tit. de Sponsal. C. & ibi Sichard. nu. 11. (*r*) Inst. jur. can. tit. de Sponsal. §. 1. Anto. Gubert. Tract. de Sponsal. fol. 27. 28. &c. Schneid. Tract. de Nupt. fol. 18. Covar. Tract. de Sponsal. secunda parte c. 4. in prin. (*s*) L. sufficit. ff. de Sponsal. Summa Hostiens. tit. de Sponsal. §. qualiter Sichard. in d. Rub de Sponsal. C. nu. 11. Schneid. Tract. de Nupt. fol. 18. (*t*) Dec. & Alciat. in Lecta. Sicert. pet. ff. Lucas de Penna in l. 3. de bon. vacan. C. c. sicut 32. q. 2. (*u*) c. cum locum, de Sponsal. extra & ibidem communiter DD. & infra. (*x*) c. requisivit. c. gemma de Sponsal. extra lib. 6. consil. matrimon. consil. ibidem 46. nu. 2. & consil. 77. nu 25. And. Gail. lib. 2. pract. obs. 93. obs. Reusner. Tract. de caus. matrimon. q. 6. (*y*) And. Gail. Præall. obs. 93. nu. 11. in fine, Reusner. Tract. de Sponsal q. 7. (*z*) c. 1. 29. q. 1. Covar. Tract. de Sponsal. secunda parte, c. 3. §. 7. Reusner. de Sponsal q. 5. (*a*) L. in Sponsal. ff. de Sponsal. c. literas de Desponsat. Imp. extra. (*b*) L. oratione de Sponsal. ff. c. cum quod de Reg. Jur. in Sext. (*c*) Stat. Hen. 8. Anno 32. c. 38. (*d*) L. 2. C. de incest. Nupt. leum qui C. de Adult. Cardinal. in c. pen de Sponsal. extra nu. 4. Palæot. de Nothis &c. Spur. c. 6. in prin lib. 1. Consil. matrimon. consil. ibidem 15. n. 24.

7. There be other words in the Definition, *viz.* [*futurarum Nuptiarum*] of future Marriage, in which words both the Matter and the End of the Spousals are comprized.

prized. The Matter of Spousals is nothing else but Marriage (*e*): The End, that by Solemnization of the promised Marriage the Parties betroathed may become perfect Husband and Wife (*f*). Of which Marriage, with the Causes, Effects, and Impediments, because there followeth a several Discourse, I shall not now need to dwell any longer in this definition.

(*e*) Wesemb. in tit. de Sponsal. ff. nu. 5.
(*f*) Wesemb. eodem loco, n. 7.

SECT. III.

The division of Spousals.

1. First and principally Spousals be either *de futuro*, of that which is to come, or else *de præsenti*, of that which is present (*a*): Spousals *de futuro* are a mutual Promise or Covenant of Marriage to be had *afterwards* (*b*): As when the Man saith to the Woman, [*I will take thee to my Wife*] and she then answereth, [*I will take thee to my Husband* (*c*)]. Spousals *de præsenti* are a mutual Promise or Contract of *present* Matrimony (*d*); as when the man doth say to the Woman [*I do take thee to my Wife*] and she then answereth [*I do take thee to my Husband* (*e*)].

(*a*) c. si inter &c c. pen. de Sponsal. extra.
(*b*) Wesemb. in tit. de Sponsal. ff. Jo. Frigeus Tract. de Sponsal. in fine. Inst. fol. 272.
(*c*) c. is qui sidem, c. si inter de Sponsal. extra. Kling. Tract. de Causis Matrimonial. in prin. Schneid. Tract. de Nuptiis, fol. 18. nu. 5. (*d*) Wesemb. tit. de Sponsal. ff. Jo. Frigeus. Tract. de Sponsal. in fine. Inst. fol. 273. (*e*) c. pen. de Sponsal. extra, & ibi omnes DD. Covar. Tract. de Sponsal. secunda parte, c. 4. §. 1. in prin.

2. But here methinks some man doth pull me by the sleeve, and tell me in my Ear, That this distinction fighteth with the former definition of Spousals, be-

becauſe if Spouſals be only *futurarum Nuptiarum repromiſſio*, a Promiſe of future Marriage (*f*), it cannot abide Spouſals *de præſenti*, being a Covenant of preſent Matrimony (*g*): And therefore either the definition is inſufficient, comprehending only Spouſals *de futuro*, or if it be perfect, it deſtroyeth this member of Spouſals *de præſenti* (*h*).

3. To this Objection I anſwer thus: True it is, that Spouſals *de præſenti* are *improperly* called *Spouſals* (*i*), being in nature and ſubſtance, rather Matrimony than Spouſals (*k*): Nor was this diſtinction known to the Makers of the Civil Law (*l*), nor to *Frontonius*, who firſt deviſed the definition of Spouſals above One thouſand years ago (*m*), but invented ſince by the Canoniſts (*n*). And yet nevertheleſs (if we will be patient) there is no ſuch enmity or diſagreement betwixt that definition, and this diſtinction, but that they may be reconciled: For this word *Nuptiæ*, Marriages, is not evermore referred to the Subſtance and indiſſoluble Knot of Matrimony only (*o*), but doth often ſignifie the Rites and Ceremonies obſerved at the Celebration of Matrimony only (*p*), which thing being true, then is it not falſe, that ſeeing a man may contract preſent Matrimony, and yet refer the Solemnization thereof till another time, in reſpect of this future Solemnization; The Contract *de præſenti* may juſtly be defended and verified to be *futurarum Nuptiarum repromiſſio*, a promiſe of future Marriage (*q*).

(*f*) l. 1. de Sponſ. ff.
(*g*) Weſemb. tit. de Sponſ. ff. nu. 3. Kling. Tract. de Cauſis Matrimon. fol. 6.
(*h*) *Hoc pertinet quod Scriptum reliquit.* And. Gail. lib. 2. obſ. 80. nu. 5.
(*i*) Jo. Frigeus. Tract. de Sponſ. in fine tit. fol. 274. Panor. & Felin. in Rub. de Sponſ. extra. & in c. 3. de præſump.
(*k*) c. penult. de Sponſ. extra, c. ex parte. Qui fil. ſunt legitimi. & Pan. in d. c. pen. Peck. Tract. de teſtam. conjugum lib. 4 c. 11. nu. 1 Schneid. Tract. de Nupt. fol. 21. nu. 19. Melch. Kling. Tract. de Cauſis Matrim. fol. 8. Moraldus Tract. de Matrimonio, f. 29.

(*l*) Schneid. Tract. de Nupt. fol. 18. Q. Quot ſpecies nu. 3. Covar. Tract. de Sponſal. prima parte, c. 1. nu. 4. (*m*) Frontonius l. 1. de Sponſal. ff. *Frontonius autem floruit longè ante Juſtinianum, qui anno poſt natum Chriſtum, 576. edidit librum Digeſtorum, in quo extat hæc definitio.* (*n*) Schneid. d. fol. 18. c. pen. de Sponſ. extra. & ibi Pan. Olden. de Sponſ. fol. —— (*o*) Spiegel. Lexic. verb. Nupt. l. 1. de ritu Nupt. ff. (*p*) c. nec illud 30. q. 5. Geneſ. c. 24. v. 66. *Imò ut diverſa non rarè ponuntur Nuptiæ & Matrimonium*, Weſemb. tit de ritu Nupt. ff. nu. 1. Adde Rebuff. in l. pronunciatum. §. Matrem familias, ff. de verb. ſign. (*q*) Panor. & alii in d. c. pen de Sponſal. extra. Palæot. de Noth. & Spur. c. 5.

4. Secondly of *Spouſals*, ſome be *pure* and *ſimple*, and ſome *conditional* (*r*). Pure or ſimple Spouſals be they, wherein is no Condition: As, [*I take thee to my Wife*] [*I take thee to my Husband,*] &c. (*s*). Conditional Spouſals are they whereunto ſome ſuch Quality is annexed, as thereby the validity of the Contract is *ſuſpended* or *ſtayed*; as, [*I will marry thee if my Father conſent*] &c. (*t*). Unto which diſtinction it may be added, that ſome Spouſals be referred *to a day*; as, [*I will marry thee before the firſt day of* May (*u*)].

5. Thirdly, Spouſals be contracted either betwixt them which be *preſent*, or betwixt them that be *abſent* (*x*). Preſent, I mean, when the one Party is perſonally ſubject to the others Senſe (*y*). Abſent, when the one Party doth neither ſee, nor hear, nor apprehend the other with any Senſe, but are eſpouſed by *interceſſion* or *mediation* of a third perſon (*z*).

6. Fourthly, Spouſals be either *publick* or *private* (*a*). By Publick, I do hereby underſtand ſuch as be contracted before *ſufficient Witneſſes* (*b*). By Private or Clandeſtine Spouſals, thoſe which are contracted betwixt the Parties without the *preſence of Witneſſes* (*c*).

7. Fifthly, Of Spouſals, ſome are contracted by *Words*, and ſome by *Signs* (*d*); as the giving and receiving a Ring (*e*) in corroboration of Matrimony.

(*r*) Tit de condic. appoſ. in Deſponſ. Summa Hoſtiens. eodem tit. Melch. Kling. Tract de cauſ. Matrimon. fol. 3. & Frigeus. ubi ſupra. Reuſner. de Sponſ. l. q. 2.

(*s*) Frigeus de Sponſal. 375. Pan. in c. ſuper eo. de condic. appoſ. extra. Schneid. Tract. de Nupt. fol. 26. Summa Sylveſt. verb. Sponſalia q. 5.

(*t*) c. ſuper eo. de condic. appoſ. extra. & ibi Pan. & Præpoſ. Covar. Tract. de Sponſ. ſecunda parte, c. 3. in prin. Frigeus & Schneid. ubi ſupra.

(*u*) c. ſicut de Sponſal extra. & ibi Pan. & alii.

(*x*) Melch. Kling. Tract de cauſis Matrimon. fol. 1. & 2. Covar. Tract. de Sponſ. ſecunda parte c. 3. nu. 8. c. finaliter de procurat. in ſext. Anto. Gubert. Tract. de Sponſ. fol. 24. nu. 18. &c. Summa Sylveſt. verb. Sponſalia q. 2 in fine. (*y*) Gloſ. in Clem. dudum. de Sepul. §. Statuimus. verb. præſentari. (*z*) Melch. Kling. fol. 2. Sum. Hoſtiens. tit. de Sponſ. §. qualiter. (*a*) Tit. de Cland. deſponſ. extra. Jo. Frigeus. Tract. de Sponſ. in fine. Inſtit. fol. 265. Pan. & Præpoſit. in c. cum inhibitio. eodem tit. hic, nu. 5. ille, nu. 6. Reuſner. de Sponſal. lib. 1. q. 1. (*b*) Schneid. Tract. de Nupt. fol. 22. Jo. Frigeus Tract. de Sponſ. fol. 265. (*c*) Schneid. & Frigeus, ubi ſupra. Sum. Hoſt. tit. de Clandeſt. deſponſ. §. quot modis, nu. 1. (*d*) Pan. c. tuæ. de Sponſ. extra. Anto. Gubert. Tract. de Sponſal. fol. 31. nu. 16. Covar. Tract. de Sponſal. part. 2. c. 4. in prin. nu. 1, 2, 3. (*e*) c. ſi quis uxorem deſponſ. 27. q. 2. Anto. Gubert. Tract. de Sponſ. fol. 29. Covar. ubi ſupra. Lapus alleg. 57. Pan. in c. 1. de Sponſa duorum. Menoch. de præſump. lib. 3. præſump. 2.

8. Fi-

8. Finally, Of Spouſals, ſome be *ſworn* and ſome *unſworn*; that is to ſay, ſome Spouſals be confirmed by an Oath (*f*), and ſome contracted without an Oath (*g*).

(*f*) c. 2. &. c. requiſivit. de Sponſ. extra.
(*g*) Kling. Tract. de Cauſ. Matrim. fol. 3.

SECT. IV.

Of the great importance of the firſt Diviſion or Diſtinction betwixt Spouſals de futuro *and Spouſals* de præſenti.

1. WHen we ſhall view the ſmall difference betwixt thoſe words, whereby Spouſals *de futuro*, or *de præſenti* (*a*) are contracted, it cannot but ſeem ſtrange that from ſo ſmall difference of Forms, ſo great diverſity of Effects ſhould proceed: For in truth, ſo very little (very often) is the odds betwixt the Form of words of theſe two Contracts, that the beſt Learned are at greateſt variance, whether ſuch Words make Spouſals *de futuro*, or *de præſenti* (*b*). Neither is it unknown to the youngeſt Students in this Faculty, That words of *future time* do not evermore import Spouſals *de futuro* (*c*); neither words of *preſent time* always Spouſals *de præſenti* (*d*). Again, That

(*a*) De quibus (infra) eadem parte §.
(*b*) DD. in c. ex literis, &c. ex parte de Sponſal. extra. Covar. Tract. de Sponſ. ſecunda parte, c. 4. §. 1.
(*c*) c. ex parte de Sponſal. extra. & ibi Pan. Soarez. Theſaur. Com. op. verb. Matrimonium, nu. 9.
(*d*) *Veluti, ſi duo impuberes Matrimonium per verba* de præſenti *contraxerint*, c. de illis & c. fin. de deſponſ. impub. extra. Pan. in c. à nobis. tit. Præſumpt. nu. 2. & Præpoſ. nu. 4. c. unic. §. 1. de deſponſ. impub. in Sext. & ibidem Geminianus & Francus. Adde dec. in l. Nuptias de Reg. Jur. ff.

ſome words are ſo *untoward*, that it is a queſtion whether they make any kind of Spouſals at all (*e*); and contrariwiſe, ſome words ſo *flexible*, that they may eaſily be ſtretched to make, either th'one, or th'other (*f*). And finally, that ſome have utterly condemned this great diverſity, which others do admit betwixt [*I will*] and [*I do*] (*g*), as captious, and the Mother of many Quarrels; the rather, for that the ruder ſort, not being able to diſcern the force of Terms, are either ſnared or intrapped themſelves, or deceived of that they verily expected of others (*h*).

(*e*) Præpoſ. in c. ex literis de Sponſ. nu. 4. & 5. Covar. Tract. de Sponſ. ſecunda parte, c. 4. §. 1. nu. 6. & 7. Sum. Angelica. verb Matrimonium q. 2. nu. 13. Præpoſ. in d. c. ex parte, nu. 8. & infra eadem parte.

(*f*) Summa Hoſtiens. tit. de Matrimonio. §. qualiter. Vivius Theſaur. com. op. verb. Matrimonium. (*g*) Martinus Lutherus, Libell. de cauſ. Matrimon. Schneid. Tract. de Nupt. fol. 19. Jo. Frigeus de Sponſal. fol. 274. in fine. Inſtit. lib. 2. Conſil. Matrimonial. conſil. 1. (*h*) Schneid. poſt. Luther. ubi ſupra. & Jo. Frigeus fol. 274. lib. 2. Conſil. Matrimon. conſil. ibidem. 1.

2. But yet for all this, leaſt this diſtinction betwixt Spouſals *de futuro*, and Spouſals *de præſenti* (moſt commonly received throughout all Chriſtendom, and which all the Conſiſtories in *England* do ſtill retain) might, in any man's opinion, ſeem to be of no leſs importance, than it is, or not ſo much regarded as it ought, I thought it convenient, e're I did proceed any further, to deliver ſome different *Effects* of importance betwixt theſe two kinds of Spouſals, to remove this erroneous Conceipt: Underſtand therefore, that that man and that woman, which do contract Spouſals *de futuro*, as [*I will take thee to my Wife*; *I will take thee to my Husband*] are not very Husband and Wife (*i*), neither ſo reputed in Law (*k*), except in certain Caſes hereafter expreſſed (*l*), which excepted, they may by *mutual agreement* diſſolve thoſe Spouſals, and ſafely

(*i*) c. requiſivit e. ſi inter de Sponſ. extra. Pan. & Felin. in rub. de Sponſ. extra. quibus (ſi placeat) adjungas. Theod. Bez. Tract. de divorc. in prin. poſt. Lateranenſe conſilium part. 6. c.

(*k*) l. in eo Jure §. hoc caput. ff. de ritu Nupt. l. ſolet. §. ult. ff. de his qui not. infam. c. 2. requiſivit de Sponſal. extra.

(*l*) Infra eadem parte §. 17.

match

match themſelves elſewhere (*m*); or if but th'one of them alone ſhall renounce, and thereupon adventure indeed to marry otherwiſe, or to contract Spouſals *de præſenti* with ſome other Perſon, in theſe Caſes, by the Laws Civil (*n*) and Eccleſiaſtical (*o*), this Marriage or Contract *de præſenti* ſhall ſtand firm and lawful, notwithſtanding that Precontract of Spouſals *de futuro*: The reaſon is, becauſe, like as when a man doth promiſe, that he will ſell his Land, the Land is not thereby ſold in deed, but promiſed to be ſold afterwards (*p*); ſo whiles the Parties do promiſe only, that they will take, or will marry; they do not thereby preſently take or marry (*q*): But deferring the accompliſhment of that promiſe, until another time, the Knot in the mean time is not ſo ſurely tied, but that it may be looſed, whiles the matter is in ſuſpenſe and unperfect (*r*). But that woman, and that man, which have contracted Spouſals *de præſenti*; as, [*I do take thee to my Wife*] and [*I do take thee to my Husband*] cannot by any Agreement diſſolve thoſe Spouſals, but are reputed for very Husband and Wife in reſpect of the Subſtance, and indiſſoluble Knot of Matrimony (*s*); and therefore if either of them ſhould in fact proceed to ſolemnize Matrimony with any other perſon, conſummating the ſame by Carnal Copulation, and Procreation of Children: This Matrimony is to be diſſolved as unlawful (*t*), the Parties marrying to be puniſhed as *Adulterers* (*u*), and their Iſſue in danger of *Baſtardy* (*x*).

(*m*) c. 2. de Sponſal. extra. & c. requiſivit eodem. Summa Hoſt. tit. de Sponſ. §. ult. verſ. Item 8.

(*n*) l. 1. de Sponſal. C.

(*o*) c. ſicut. c. ſi inter. de Sponſ. extra.

(*p*) Gl. in l. mentis C. de contrahend. empt. Jaſ. & alii in l. ſervi electione de Legat. 1. ff.

(*q*) Melch. Kling. Tract. de cauſ. Matrimon. fol. 1. Pan. & alii in c. ex literis el. 1. de Sponſ. extra.

(*r*) c. præterea c. requiſivit de Sponſ. extra.

(*s*) c. Conjux. c. cum initiatur 27. q. 2. Morald. Tract. de Matrim. fol. 29. Melch. Kling. Tract. de cauſ. Matrim. fol. 7. in fine. Pan. in c. cum locum. de Sponſal. extra, nu. 3. Hier. Schurpf. lib. 2. conſil. Matrimon. conſil. ibidem 24. nu. 2. Schneid. Tract. de Nuptiis fol. 18. n. 4. (*t*) c. ſi inter. de Sponſ. extra. & ibidem Card. n. Præpoſ. & Pan. Kirkhovius Theſaur. com. op. verb. Matrimonium. (*u*) c. 2. de Sponſa duorum, & ibi DD. (*x*) Hoſt. Summa tit. de clandeſt. deſponſ. §. quam penam, nu. 2. verb. nunquid Innoc. in c. cum Inhibitio eodem, tit. nu. 4, & Cardin. ibidem in fine & infra.

3. The reason is, because here is no Promise of any future Act, but a present and perfect Consent (*y*), the which alone maketh Matrimony (*z*), without either Publick Solemnization (*a*) or Carnal Copulation (*b*); for neither is the one, nor the other of the *Essence* of Matrimony, but *Consent* only (*c*): Such a Wife was the blessed Virgin *Mary* (*d*), that is to say, betroathed to *Joseph*, but neither solemnly married with him, nor secretly known by him, at the Conception of Christ (*f*); and yet nevertheless termed Wife in the Holy Scriptures (*g*): For as well the Sacred Scriptures (*h*), as the Civil (*i*) and Ecclesiastical Laws (*k*), do usually give to Women betroathed only, or affianced, the Name and Title of *Wife*, because in truth the man and woman, thus perfectly assured, by words of *present time*, are Husband and Wife before God and his Church (*l*).

(*y*) Schneid. Tract. de Nupt. fol. 18. nu. 5. & 6. & fol. 21. nu. 19.

(*z*) L. sufficit ff. de Sponsal. c. sufficiat 27. q. 2. c. cum apud Sedem. de Sponsal. extra.

(*a*) c. 1. de Sponsal. duorum extra. c. nec illud 30. q. 5. l. Si donationum C. de Nupt. lib. 1. consil. matrim. fol. 273. nu. 1. & 2. Hiero. Schurpf. l. 2. consil. Matrim. consil. ibidem 24. nu. 4.

(*b*) L. Nuptias de Reg. Jur. ff. Morald. Tract. de Matrimonio fol. 29. versic. Sponsalia. Reusner. lib. 1. de caus. Matrimon. q. 2. nu. 35, 36, & 37. Panor. in c. cum locum. de Sponsal. extra. nu. 3. & Apostilla ibidem litera E. (*c*) d. c. nec illud, & Præall. l. Nuptias. And. Gail. lib. 2. observ. pract. obs. 80. nu. 4. Palæotus de Nothis & Spuriis, c. 5. Hiero. Schurpf. inter consil. Matrimon. vol. 2. consil ibidem 24. nu. 2, 3, 4. Pan. in c. cum locum. de Sponsal. nu. 3. cum addit. ibidem litera E. (*d*) c. beata Maria. c. quod autem. c. priusque, c. inventa 27. q. 2. Ex authoritate Augustini, Gregorii, Chrysostomi, & Origenis. (*e*) Matth. c. 1. versic. 18. Luc. c. 1. vers. 27. desponsata quidem sed per verba *de præsenti*, Gl. in d. c. inventa. (*f*) Præall. c. beata Maria. c. quod autem. c. priusque, & c. inventa 27. q. 2. Hen. Smith. de præparat. matrim. fol. 2. *qui refert Christum quidem conceptum fuisse post Sponsalia, natum autem post celebratum Matrimonium, ut utrumque statum, nempe Virginitatis & Conjugij commendaret.* (*g*) Matth. c. 1. vers. 20. (*h*) Deuter. c. 22. vers. 23, 24. Kling. Tract. de caus. Matrim. fol. 8. Schneid. Tract. de Nupt. fol. 22. (*i*) l. si Sponsa. de Jure. dot. l. ex Julia. de fundo dotali. ff. (*k*) c. institutum, c. conjux 27. q. 2. Panor. in rub. de Sponsal extra. (*l*) c. cum initiatur 27. q. 2. Everard. consil. 11. c. cum apud. de Sponsal. extra. Præposit. in c. cum Inhibitio. de clandestin. desponsat. extra. in fine. Palæotus de Nothis & Spur. c. 5. Melch. Kling. Tract. de caus. Matrim. fol. 8. Schneid. fol. 18. nu. 4. & fol. 22. nu. 19. Pan. in c. pen. de Sponsal. extra. nu. 2. Hiero. Schurpf. inter consil. Matrimon. vol. 2. consil. ibidem 24. nu. 2. Morald. Tract. de Matrimonio, fol. 29.

4. Worthily therefore was that Branch of the Statute of noble King *Henry* the Eighth (*m*), establishing, [*That Marriages contracted and solemnized in the Face of the Church, and consummate with bodily knowledge, or fruit*

(*m*) Anno 32. c. 38

fruit of Child or Children, should be judged and taken for lawful and indissoluble, notwithstanding any Precontract of Matrimony, not yet consummate with bodily knowledge, &c.] worthily, I say, and upon good ground was this Branch of that Statute (established by the Father) repealed and made void by his gracious Son King *Edward* the Sixth (*n*), for Spousals *de præsenti*, though not consummate, be in truth and substance very Matrimony (*o*), and therefore perpetually indissoluble (*p*), except for Adultery (*q*): Although by the Common Laws of this Realm (like as it is in *France* and other places) Spousals not only *de futuro*, but also *de præsenti* be destitute of many *legal Effects* wherewith *Marriage solemnized* doth abound, whether we respect legitimation of Issue, alteration of property in her Goods, or right of Dower in the Husbands Lands.

(*n*) Anno 2 i c. 23.
(*o*) l. Nuptias de Reg. Jur. ff. lib. 1. consil. Matrimon. consil. ibidem 5. nu. 2. Reusner. lib. 1. de cons. Matrimon. q. 2. nu. 9, 10. & nu. 35, 36, & 37.
(*p*) c. si inter. de Sponsal. c. 1. de Sponsa duorum extra.
(*q*) c. Præcepit Dominus 32. q. 5. c. quemadmodum. De Jure jur. extra.

SECT. V.

What Persons may contract Spousals de futuro.

1. SInce it appeareth that the distinction betwixt Spousals *de futuro* and *de præsenti*, is not an idle distinction, or to little purpose, but of very great use, and no less importance, we are now to descend somewhat lower, and to prosecute either kind of Spousals severally and particularly.

2. Where-

2. Wherefore beginning with Spousals *de futuro*, let us examin first, What *Persons* may contract Spousals *de futuro* (*a*): Next by what *Form* of words this kind of Spousals is contracted (*b*): Thirdly, what are the *Effects* thereof (*c*): And fourthly, by what means the same may be *dissolved* (*d*).

3. Concerning the *Persons* I find two Rules, the one *Affirmative*, the other *Negative*: The Affirmative Rule is this, What Persons soever may contract *Matrimony*, the same Person may contract *Spousals de futuro* (*e*). But every Person which hath discretion to consent, and therewithal to perform the duty of Marriage, may contract Matrimony (*f*), if otherwise he be not prohibited (*g*); and therefore every such Person may lawfully contract Spousals: which Rule is very reasonable, being put affirmatively, because to whom that is lawful which is great, that which is less, is much more lawful: Now it is a greater matter to contract Matrimony than Spousals, for by lawful Marriage the Knot is made for ever indissoluble (*i*); but Spousals are many ways subject to overthrow and dissolution (*k*). Marriage was ordained of God in *Paradise* (*l*), Spousals long after by Man (*m*): By Marriage the Man and the Woman are made one Flesh (*n*), so are they not by only Spousals (*o*). To be short, Marriage is that great Mystery representing that Spiritual Marriage betwixt Christ and his Church (*p*); but Spousals are utterly destitute of this mystical Effect (*q*): And therefore since Marriage is greater than Spousals, it followeth by a sound Argument *à majori ad minus* (*r*), That those

(*a*) Infra eadem §. & Paragraphis seqq.
(*b*) Infra eadem parte §.10.
(*c*) Infra eadem parte §.17.
(*d*) Infra eadem parte §.18.
(*e*) Hostiens Summa tit. de Sponsi. §. quis possit. Sichard. in Rub. de Sponsi. C. nu. 15. Summa Sylvestrina. verb. Sponsalia. q. 2.
(*f*) Summa Hostiens. tit. de Matrim. quis possit.
(*g*) Hostiens. ubi supra.
(*h*) c. cui de Reg. Jur. in Sexr.
(*i*) *Quod Deus conjunxit homo nè separet.* Marc. c. 10. verf. 9.
(*k*) Kling. Tract. de cauf. Matrim. fol. 5. Præpos. in c. de illis de Sponsi. extra. in fine. lib. 1. consil. Matrim. consil. ibidem 15. nu. 11.
(*l*) Genes. c. 2. verf. 21, 22, 23, 24.
(*m*) Anto. Gubert. Tract. de Sponsi. fol. 7. nu. 4. Exod. c. 22. v. 16. Deut. c. 22. verf. 28.
(*n*) Genes. c. 2. in fine. Epist. ad Ephes. c. 5. verf. 31.
(*o*) c. Institutum 27. q. 32.
(*p*) Epist. ad Ephes. c. 5. 32.
(*q*) c. Institutum 27. q. 2. Præpos. in c. 1. de Sponsi. duorum, nu. 1. Anto. Gubert. Tract. de Sponsi. fol. 43.
(*r*) Everard. & Olden. Loco à Maj. ad minus.

Persons

Perſons which may contract *Matrimony*, may alſo contract *Spouſals*.

4. The Rule Negative is, That whoſoever is prohibited to contract Matrimony, the ſame Perſon is alſo prohibited to contract Spouſals (*s*); becauſe where the *End* is forbidden, there the *Means* alſo, whereby the *End* may be atchieved, is prohibited (*t*); which Reaſon might be illuminated with ſundry Examples (*u*); but for that this Negative Rule hath ſundry apparent Fallacies (*x*), I will not ſtrive to make it ſeem infallible, let this one ſuffice, namely, That *Children* cannot contract Matrimony (*y*), and yet may contract Spouſals *de futuro* (*z*). And now becauſe indeed this is the chief and principal Exception of this Rule, I think it here convenient to entreat of the *Age* wherein Spouſals *de futuro* may be contracted.

(*s*) l. Oratio de Sponſ. ff. & ibi Bald. & alii.

(*t*) c. cum quod de Reg. Jur. in Sext. Bart. in d. l. Oratio.

(*u*) Dyn. Phil. Franc. & Peck. in d. c. cum quod.

(*x*) Sichard. in rub. de Sponſ. C. nu. 15, 16. &c. Addit. ad Bart. in l. Oratio de Sponſ. ff.

(*y*) l. minorem ff. de ritu nuptiarum, c. puberes. & c. de illis de deſponsa impuberum extra. vivius lib. 2. conſil. matrim. fol. 209. col. 1.

(*z*) c. à nobis de deſpons. impuber. extra. & c. fin. ibidem. Anto. Gubert. tract. de ſponſal. fol. 21. nu. 7.

D SECT.

SECT. VI.

Of Spouſals contracted by Infants.

1. THere be three Ages conſiderable in this Matter of Spouſals (*a*): The firſt is *Infancy* (*b*): The ſecond is the Age between Infancy and ripe Age (*c*), (which, if it pleaſe you, we will call *Childhood*): The third is *ripe Age* (*d*).

2. Concerning the firſt Age, this Rule is delivered both by the Civil (*e*) and Canon Laws (*f*), That *Infants* cannot contract any kind of Spouſals: Upon which Concluſion, divers, as well Ampliations as Limitations, do attend (*g*). But before they be admitted into preſence, it ſhall not be unprofitable to examine what Perſons be accounted *Infants*.

3. By *Infants* therefore, if we reſpect the Nature of the word, are underſtood thoſe Younglings and Babes which as yet cannot ſpeak (*h*), for ſo this Subſtantive [*Infans*] an Infant, doth import (*i*), being compounded of *in* and *fando* (*k*), of not ſpeaking, the Præpoſition (*in*) ſtanding for [*non*]; in which Senſe the *Roman* Poet doth uſe it, writing

Infandum Regina jubes renovare dolorem;

for *non fandum*, or *ineffabilem dolorem* (*m*).

(*a*) Hoſt. Sum. tit. de deſpons. impub. §. quis dicatur.
(*b*) c. 1. de deſponſ. impub. lib. 6. & Hoſt. ubi ſupra.
(*c*) eodem c. §. 1. & Hoſt. ubi ſupra.
(*d*) eodem c. §. ult. & Hoſt. ubi ſupra.
(*e*) Lin Sponſal. & l. 2. de Sponſal. ff.
(*f*) c. 1. de deſponſ. impub. lib. 6.
(*g*) ut infra hoc ipſo §.
(*h*) Calepin. verb. infans. Jas. in l. 1. ff. de Verb. Oblig. nu. 22. Menoch. de Arb Jud. lib. 2. caſ. 57. nu. 8.
(*i*) Menoch. de Arb. Jud lib. 2. cas. 57. nu. 17. Jas. ubi ſupra.
(*k*) *Veluti inutilis, infælix, incertus*, Calepin. Diction. Verb. *In.*
(*m*) Virgil. lib. 2. Æneid. in prin. *Siquidem vix dici poteſt quantus ſit viro forti dolor ſe victum confiteri.* Servius & Donatus in illo loco.

4. Our.

4. Our Temporal Lawyers no leſs ſignificantly than uſually, do call them Infants which have not attained yet to the Age of One and twenty years (*n*), becauſe until that time they are as it were *Tongue-tied*, being unable to ſpeak, at leaſt *effectually*; and though they ſpeak *naturally*, yet do not the Laws underſtand, or acknowledge their words to be of any force, either for Alienations or other Contracts, more than if they were young Infants, naturally deſtitute both of Speech and Judgment (*o*).

5. In *Germany* (*p*), *Spain* (*q*), and other Countries (*r*), he that is *Heir*, though otherwiſe he be of lawful years, and how old ſoever, yet ſo long as he yet liveth, to whom he is Heir (as the Son during the Father's Life, or the younger Brother during the Life of the Elder) is uſually called *Infant* (*s*), becauſe he hath no power to meddle with the Inheritance, the Laws having ſet a Lock before his Lips, ſo that he is not to ſpeak in theſe Affairs, the Care and Amdiniſtration whereof is yet in another Perſon (*t*).

6. We read alſo that *Servants* or *Bondſlaves* are ſometimes called *Infants* (*u*): And in other places this word [*Infans*] hath other ſignifications, and is attributed not to *Men* alone, but to *Beaſts* alſo (*x*).

7. In the *Civil* (*y*) and *Eccleſiaſtical* (*z*) *Laws*, by Infants (moſt commonly) are underſtood thoſe Children which have not as yet accompliſhed the Age of *Seven* years; and ſo is the word accepted in this place (*a*).

(*n*) Dr & Stud. lib. 1. c. 21. lib. 2. c. 28. Terms of Law. Verbo Gardein. Brooke Abridgment. tit. Coverture. pluribus locis.

(*o*) Dr. & Stud. ubi ſupra cui adde Spiegel. Lexic. verb. Infans.

(*p*) Spiegel. Lexic. verb. Infans.

(*q*) Extravag. 1 Jo. 22. tit. de Judæis. & ibi Gloſſ. verb. Infans Rebuff. in l liberorum, §. final. de Verb. Sign.

(*r*) viz. apud Judæos, teſte Hiero. in c 20. Geneſ. & apud Gallos, teſte Rebuff in d. l. liberorum, in fine.

(*s*) Spiegel. Lexic. verb. Infans. & Rebuff. ubi ſupra.

(*t*) ibidem.

(*u*) Spiegel. Lexic. verb. Infans.

(*x*) Calepin. Lexic. verb. Infans.

(*y*) l. Infans. ff. ad l. Cornel. l. 1. C. de falſ. monet. l. ſi Infanti C. de jure deliberand. l. in Sponſalibus, el. 2. ff. de Sponſal.

(*z*) Proœm. lib. 6. decretal. & gl. ibidem verb. perfectus.

(*a*) l. in Sponſalibus, el. 2. de Sponſ. ff. c. 1. de deſponſ. impub. in Sext.

8. Wherefore to return to the right Path of our purpoſed Journey, where it is delivered, That Infants cannot contract Spouſals; it is underſtood of thoſe Children which be under the Age of *Seven* years (*b*): They therefore which are not Seven years old cannot contract Spouſals; which Concluſion hath ſo much the more Reaſon, by how much theſe young Infants want Reaſon and Judgment to judge of theſe Affairs (*c*), being fitly compared to them which are *aſleep* (*d*); who albeit they ſpeak many things, or do ſomething in their ſleep, yet do they not perceive what they ſay or do, nor ſleeping yield their conſent thereto (*e*).

9. The Ampliations and Limitations of which Rule are theſe: Firſt, albeit the one Party be above the Age of Seven years, yet the other Party being under Seven years, the contract of Spouſals betwixt thoſe two, is of ſo ſmall force, that if the Party which is of full Age, do contract Matrimony with a third Perſon, though that third Perſon be near of Kin to the Infant, the Marriage is good, notwithſtanding the former Contract (*f*).

10. Secondly, Albeit the Infants have attained to the Seventh year of their ſeveral Ages, yet are thoſe Spouſals void (*g*); for it is requiſite that they have wholly and *fully* accompliſhed the Seventh year when they do contract Spouſals; at leaſt, ſaving for two or three days (*h*).

11. Thirdly, Spouſals contracted during Infancy are utterly *void*, whether the Infants themſelves, or their Parents for them, do make the Contract (*i*).

12. Fourthly, Albeit both the Infants after the Contract do attain to a great number of years, yet the Spouſals

(*b*) c. Juvenis. de Sponſal. c. ad literas de deſponſ impub. extra. & c. 1. eodem tit. lib. 6. & ibi DD.

(*c*) l. 1. C. de falſ. monet. l. Infans. ff. ad l. Corneliam de Sicar.

(*d*) Clem. de homicid. & ibidem DD.

(*e*) d. Clem. Zaf. in l. poſſeſſio §. adipiſcantur in fin. de acquir. poſſ. ff.

(*f*) c. literas. c. acceſſit. de deſpon. impub. gl. in c. Juvenis. de Sponſal. extra, & ibi Panor. Præpoſ. & alii.

(*g*) d. c. literas, cum c. ſeq. Anto. Gubert. tract. de Sponſal. fol. 19. nu. 1.

(*h*) Panin d. c. literas nn. 3. Præpoſ. nu. 2. Covar. tract. de Sponſal. prima parte, c. 2. nu. 2. Henr. Boic. in c. acceſſit, & in c. atteſtationes. de deſponſ. impub. extra.

(*i*) c. 1. de deſponſ. impub. lib. 6. & ibidem Domin. nu. 2. in prin.

Spouſals contracted during their Infancy are not thereby *confirmed* (*k*), without other proof of mutual Confirmation (*l*).

13. Fifthly, The Contract made during Infancy is void, whether the Contract were celebrated by words of preſent time, as [*I do take thee*, &c.] or by words of future time, as [*I will take thee*, &c.] (*m*); for as Infants cannot contract Spouſals, ſo they cannot Matrimony (*n*), becauſe they which cannot do the leſſer, cannot do the greater (*o*).

14. The Limitations are theſe; Firſt when the Infants, after they have accompliſhed their ſeveral Ages of Seven years, do either by expreſs word ratifie (*p*) and confirm the Contract made during their Infancy, or by other words of like importance, as by calling and naming each other Husband and Wife (*q*); for by the reaſon of this *new conſent* the Contract (otherwiſe void) is become of no leſs force than if they had new made a new Contract (*r*).

15. The ſecond Limitation is when as by Deeds only they do approve and confirm the Contract made during their Infancies (*s*), as if they lye together, imbrace, or kiſs each other, or give and receive Gifts and Tokens either of them, to or from the other, after both their Ages of Seven years; for by *Deeds* the former Spouſals are confirmed, as well as by *Words* (*u*).

16. The third Limitation (like unto the ſecond) is, when the Infants, after the accompliſhment of their ſaid ſeveral Ages, do mutually cohabit or dwell together (*x*), and are not ignorant of the Contract made be-

(*k*) Præall. c. unic de deſponſ. impub. & gl. lib. 6. & c. literas de deſponſ. extra.

(*l*) eodem c. in prin. Covar. tract. de Sponſal. prima parte, c. 2. in fin.

(*m*) Jo. And. in c. unic. de deſponſ. impub. in Sext.

(*n*) c. ubi & c. puberes de deſponſ. imp. extra cum Similibus, & Pan. in d. c. ubi.

(*o*) Peckius in c. cui licet de Reg. Jur. in Sext. Everard. loco à minori.

(*p*) c. 1. de deſponſ. impub. in Sexto in prin.

(*q*) gl. in d. c. 1.

(*r*) Auto. Gubert. Tract. de Sponſal. fol. 20. nu. 3.

(*s*) c. unic. de Sponſal. lib. 6. in prin. Covar. tract. de Sponſ. prima parte c. 2 in fine.

(*t*) Gloſſin d. c. unic. ibi, vel facto quam ſequitur Domini. & Phil. Perus. Baptiſt. Theſaur. com. op. verb. Sponſalia nu. 92. Licet Hoſtienſ. in diverſam eat Sententiam.

(*u*) Covar. tract. de Sponſal. prima parte, c. 2. in fine, & gloſ. ubi ſupra. pro c. dilecti & c. ut noſtram. de App. extra.

(*x*) c. unic. de deſponſ. impub. in prin. lib. 6.

twixt

twixt them, during their Infancy; for otherwiſe they do not ratifie that which they know not (*y*).

17. The fourth Limitation is, when two contract Spouſals, of whom the one is more than Seven years old, the other near Seven years (*z*), ſuppoſe ſix and a half (*a*); if theſe Perſons ever, during the Infancy of the younger Party, do either lye together (*b*), or cohabit together (*c*), by occaſion whereof it remaineth doubtful, whether they have eſſayed to know each other; in this Caſe the Contract hath like effect as if the Parties had both accompliſhed the Age of Seven years (*d*).

18. The fifth Limitation is, when the Infants which do contract Spouſals are of that *Wit* and *Diſcretion*, that albeit they have not as yet accompliſhed the full Age of Seven years, yet doth their ſupraordinary Underſtanding fully ſupply that ſmall defect of Age, which thing is not rare in theſe days, wherein Children become ſooner ripe, and do conceive more quickly than in former Ages (*e*): Wherefore in this Caſe, by that Opinion which ſavoureth more of Equity (*f*), and which (as I take it) is more commonly received (*g*), this Contract is not void, but of equal force as if theſe Infants had out-grown their Infancy when they were Eſpouſed. I confeſs this Opinion hath many and mighty Adverſaries (*h*), affirming confidently, That it cannot be proved by Law, that Infants may contract Spouſals before the end of Seven years, though otherwiſe their Prudence did ſupply the want of Age (*i*). But yet for all this, conſidering that by the very Text of the Law, not only (after the accompliſhment of thoſe numbers of years, ſeverally preſcribed to the Man and Woman for

(*y*) Dominic. & Phil. Franc. in d. c.

(*z*) c. Juvenis de Sponſal. extra.

(*a*) Jo. And. Hoſt. Præpoſ. & alii communiter in d. c. Juvenis.

(*b*) Hoſt. d. c. Juvenis & ibi Præpoſ. verb. tertius Intellectus.

(*c*) Card. & Panor. in d. c. Juvenis & ibi Præpoſ. verb. quartus Intellectus.

(*d*) d. c. Juvenis & ibi DD.

(*e*) Damhouder. pract. Criminal. c. 84. nu. 5.

(*f*) Dom. Anto. in d. c. Juvenis & ibi Pan. in fin.

(*g*) Sum. Hoſtienſ. tit. de Sponſ. §. qualis ſit effectus. verb. effectus eſt Cardinal. Dom. Anto. in c. Juvenis de Sponſ. extra. & ibi Præpoſ. verſic. primus Intellectus. Summa Sylveſt. de Sponſal. q. 2. Covar. de Sponſal. prima parte, c. 2. nu. 1. *quorum opinio communis eſt, ut ex eiſdem Autor. patet.*

(*h*) Panor. in d. c. Juvenis, Socin. Sen. conſ. 3. vol. 1. gl. in Inſt. Juris Can. tit. de Sponſal. §. non tamen verb. minores.

(*i*) Panor. in d. c. Juvenis in fin.

Marriage, he or ſhe may lawfully contract Matrimony, but alſo before thoſe years, in caſe their *natural Abilities* ſupply the want of Age (*k*), that is, ſuffice to perform the Duty of Marriage (*l*), then *à fortiori* (by all reaſon) may thoſe Perſons contract Spouſals, whoſe *Prudence* doth ſupply the other want of Age (*m*), both becauſe Spouſals are more eaſily diſſolved than Matrimony (*n*), in caſe of the Parties diſliking, as alſo becauſe *conſent* alone is of the Subſtance of Spouſals, without that *natural Ability* requiſite in Marriage (*o*): Hence it is that the Laws make no difference betwixt their Ages who do contract Spouſals, namely, becauſe conſent alone is ſufficient (*q*); whereas in the Contract of Marriages there is regard had, not only of the Parties Judgment and Underſtanding, but alſo of the natural Ability of their Bodies (*r*), as a thing very neceſſary in that behalf (*s*).

19. Here may be demanded, What if two Infants contracting Spouſals by words of preſent time, do not only confirm the ſame after that they have overpaſſed their Infancy, but alſo after they be come to lawful years of Marriage, whether is this Contract to be adjudged more *Spouſals* or *Matrimony*? In this Queſtion the Writers do vary (*t*), and it dependeth of other Points to be examined before we can conveniently come to the Solution, which cannot be here handled without confuſion; but as ſoon as opportunity ſerveth it ſhall be ſatisfied.

(*k*) c. puberes c. de illis. de deſponſ. Impub. extra. & ibi DD. Kling. tract. de cauſ. matrim. fol. 15. Guber. Coſtan. tract. de matr. fol. 66. nu. 15, 16, &c.

(*l*) Panor. in c. de illis. el. 2. nu. 3. Kling & Coſtan. ubi ſupra.

(*m*) Præpoſ. & communiter DD. in d. c. Juvenis. Covar. tract. de Sponſ. prima parte, c. 2. Summa Sylveſtrit de Sponſal. q. 2.

(*n*) Schneid. tract. de nupt. fol. Melch. Kling. tract. de cauſ. matrim. fol. 6. Summa Hoſtiens. de Sponſal. §. ult.

(*o*) l. ſufficit. de Sponſal ff Sum. Sylveſt. tit. de Sponſal. q. 2.

(*q*) Ant. Gu-

bert. tract. de Sponſal. fol. 21. n. 6. Faber. & Angel. in §. 1. Inſt. de nupt.

(*r*) c. puberes, c. de illis. cum Similibus de deſponſ. impub. extra.

(*s*) DD. in d. c. puberes. & c. de illis. Covar. de Sponſ. prima parte, c. 2.

(*t*) Jo. Andr. Archid. Phil. Franc. & alii. in c. 1. §. 1. de deſponſ. impub. l. 6. Decis. Rotæ. 463. vid Sect. 8. part. 7.

SECT.

SECT. VII.

Of Spousals contracted by Children betwixt Infancy and ripe Age.

1. THe second Age to be regarded in Persons contracting Spousals is *Childhood*, which Age how far it reacheth is needful to be known: Children therefore, in respect of their Age, are so termed of some, until they be twice Seven years old (*a*); of some till they be thrice Seven years old, that is One and twenty (*b*), sometimes Children are so called until they be of the Age of Two and twenty years (*c*), sometimes until they be of the Age of Eighteen (*d*), sometimes until they be Twenty (*e*), and sometimes till they be Five and twenty (*f*), according to the variety of the *subjected Matter* and Meaning of the Author (*g*). In the holy Scriptures we read, *Puer centum annorum morietur* (*h*); that is, a Child of an hundred years shall dye, if we translate it after the Letter.

(*a*) Aristot. Histor. Animal. lib. 5. c. 14. Macrob. de quo Alciat. in l. pueri de Verb. Sign. ff. Anto. Gubert. tract. de matr. fol. 67.

(*b*) Tract. de repub. Angl. lib. 3. c. 5. & Alciat. post Macrob. ubi supra.

(*c*) l. 1. §. Pueri ff. de postulando, Servius Tullus Rex Rom. de quo Aul. Gel. lib. 10. c. 28. (*d*) l. mella. ff. de alimen. leg. (*e*) Rebuff. in l. Pueri de Verb. Sign. ff. versic. quintò non tenentur. (*f*) tit. de minor. vigint. quinque ann. ff. l. impuberibus, de acquir. hered. ff. & ibi gl. secundo Intellectum. (*g*) Alciatus Rebuff. & Bracheus in l. Pueri ff. de Verb. Sign. (*h*) Esaias c. 65. vers. 20.

2. By Children in this place, I understand them which have exceeded their *Infancy*, but have not as yet attained to that Age wherein nature (by the Providence of God) bestoweth Corporal Ability of performing the Act of Generation (*i*); these Children the Laws Civil

(*i*) c. Puberes. de desponsi. impub. extra. & DD. ibidem.

vil and Eccleſiaſtical, do call *Impuberes* (*k*), as it were young Plants, without Buds or Bloſſoms, being the outward Signs of inward Vigor (*l*), and they are alſo called *Pueri*, as ſome conjecture *quaſi puri* (*m*), that is, pure, or as Virgins clean from Carnal Pollution: But whether *Pueri* have their denomination *à puritate*, I will not contend: I remember *Brechæus* jeaſting at this Etymology, affirmeth, That by the ſame Reaſon we might ſay *purus* quaſi *purus aer* (*n*); but let the names go, and come we to the thing it ſelf, *Pueritia*, Childhood is the Age betwixt *Infancy* and *ripe Age* fit for Marriage (*o*).

(*k*) Alciat. in L. Pueri. de Verb. Sign. ff. Spiegel. Lexic. verb. Impuberes. & verb. Pueri. Inſtit. quibus mod. Tutel. fin. §. 1.

(*l*) *Unde pubeſcere, id eſt, laninginem circa pudenda emittere.* Præpoſ. & alii in d.c. puberes.

(*m*) Alciat. in d. L. Pueri. ff. de Verb. Sign. Spiegel. Lexic. verb. Pueri.

(*n*) Brech. in d. L. Pueri in principio.

(*o*) Hoſtienſ. Summa Tit. de deſponſ. impub. §. quis dicatur Impubes & DD. in d. c. puberes.

3. During this Age Children cannot contract Matrimony or Spouſals *de præſenti*, but only *de futuro* (*p*), which excellent Concluſion is not only adorned with ſundry Limitations of Importance, but enriched with many profitable Queſtions.

(*p*) c. de illis el. 1. & DD. ibidem. Summa Hoſtienſ. Tit. de deſponſ. impub. § & quæ Sponſalia. Hen. Boic. in c. puberes de deſponſ. impub. extra.

4. The firſt Limitation is *pro bono pacis*, for the good or benefit of Peace (*q*), and therefore if two Princes, after long or cruel Wars, concluding a friendly Peace, do for more aſſured confirmation thereof match their Children in Marriage, this *Marriage* the Laws do tolerate as lawful, being made upon ſuch urgent Cauſe, though otherwiſe for divers wants the ſame were unlawful (*r*).

(*q*) c. ubi de deſponſ. impub. extra.

(*r*) d. c. ubi & ibidem DD.

5. The ſecond Limitation is *Quando malitia ſupplet ætatem*, that is, when *natural Ability* to pay the Marriage Debt doth ſupply the want of Age (*s*), for ſo this word *malitia* doth ſignifie in this place (*t*): But wherefore it doth ſo ſignifie, I cannot, as yet, perfectly apprehend, no more than wherefore our Temporal Lawyers uſe this word [*mulier*] (which doth ſignifie a wo-

(*s*) c. de illis el. 2. de deſponſ. impub. extra, latiùs infra.

(*t*) Al. in Præal. c. nu. 3. Archid. in c. unic. de deſponſ. impub. in Sext. Kling. Tract. de cauſ. matrimonial. fol. 15. Gubertus Coſtan. Tract. de matrimon. fol. 76. nu. 50.

man which is not a Virgin) for one that is Legitimate, or that is not a Baſtard (*u*); it ſufficeth we know the meaning, which is, That albeit the Laws do not preſume any Man or Woman to be able to perform the Act of Generation, until a certain number of years (hereafter deſcribed) be accompliſhed (*x*): Nevertheleſs if it do appear, that in the mean time, and before the expiration of thoſe years, they are able to perform the Act aforeſaid, then it is lawful for them to contract Spouſals *de præſenti*, or to marry (*y*).

6. Thirdly, Albeit Children cannot contract Spouſals *de præſenti* ſo effectually, that the ſame ſhall enjoy the very force and virtue proper thereunto, yet obſerving the form of Spouſals *de præſenti* in their Contract, as [*I do take thee to my Husband, I do take thee to my Wife*, &c.] this Contract is not utterly void, but by the Interpretation of Law, obtaineth the force of Spouſals *de futuro* (*z*): Divers (I deny not) of the Ancient Lawyers were of a contrary Opinion for a long time (*a*), holding, That if by theſe words the Parties did intend to contract Matrimony, then the Contract was utterly void, not having any force either of *Matrimony* or of *Spouſals* (*b*): Not of Matrimony, becauſe if they would, they could not make any ſuch Contract (*c*): Not of Spouſals, becauſe albeit they might, yet they did not intend to make any ſuch Contract (*d*): And ſo either becauſe they could not, or would not, the Contract did not prevail at all, either as Matrimony, or as Spouſals; howbeit in the end this Opinion was daſht by later Laws made for that purpoſe, whereby it was and is eſtabliſhed, That if two Children do contract

(*u*) Terms of Law. verb. Mulier.

(*x*) Inſtit. quib. mod. Tutel. fin. §. 1. l. minorem de ritu nup. ff. Gubert. Coſtan. Tract. de matrimon. fol. 66. nu. 15. Summa Hoſtienſ. Tit. de deſponſ. impub. §. quis dicatur. nu. 1. Henric. Boic. in c. puberes. eodem Tit.

(*y*) c. puberes c. de illis el. 2. c. à nobis. de deſponſ. impub. extra. Hoſtienſ. Summa tit. de deſponſ. impub. §. quis dicatur. Panor. & Præpoſitus in d. c. puberes.

(*z*) c. unic. §. 1. de deſponſ. impub. in Sext.

(*a*) Viv. in c. à nobis de deſponſ. impub. & alii de quibus Hen. Boic. eod. c. & Hoſtienſ. Summa Tit de deſponſ. impub. §. & quæ Sponſalia. Bart. in L. prima §. Si quis ita; de verb. Obl. ff. nu. 2.

(*b*) gloſſ. poſt. Alan. in d. c. à nobis & diſputat. Hen. Boic. eod. c.

(*c*) gloſſ. in d. c. à nobis. & in c. unic. §. 1. verb. Matrimonium.

(*d*) Gloſſ. ubi ſupra & refert Covar. Tract. de Sponſal. parte 1. c. 3. nu. 2. quem vide.

Spouſals

Spouſals by words of preſent time, intending alſo thereby to contract Matrimony, yet this Contract ſhall prevail as Spouſals *de futuro* (*e*); and ſo it is if one of the Parties be of ripe Age, the other not (*f*).

7. Fourthly, By what means Spouſals contracted during *Infancy*, and therefore void at the beginning, are notwithſtanding afterwards made ſtrong and confirmed, namely by mutual Cohabitation, by Kiſſings, by Embracings, by giving and receiving of Gifts and Tokens, &c. (*g*), or by Words, expreſſing the continuance and perſeverance of the mutual Conſent; as by calling each other Husband and Wife (*h*): By the ſame means practiſed, after the Parties be of *ripe Age*, fit for Marriage, are thoſe Spouſals by them contracted in their *Minority* by words of preſent time (being then Spouſals *de futuro* by interpretation of Law only) reſolved or turned into Matrimony (*i*), from that time enjoying the ſame Properties and Effects belonging to Spouſals *de præſenti*, contracted betwixt Perſons of full and perfect Age (*k*), unleſs the Parties, after they be come to perfect Age, do firſt *diſſent*, and ſo diſſolve the Contract before they conſent (*l*): As for their diſſent before they come to perfect Age, it hindreth not the exchange or paſſage of the Contract from Spouſals (ſo termed by interpretation of Law) to Matrimony, by any the means aforeſaid (*m*). Howbeit this is to be diligently noted in this place, That Spouſals *de futuro* properly ſo called, thoſe I mean which are contracted by words of future time, (as

(*e*) Text. in c unic. §. 1. de deſponſ. impub. in Sext. Hen. Boic. in d. c. à nobis extra eod. tit. & Covar. Tract. de Sponſal. prima parte c. 3. nu. 2.

(*f*) d.c. unic. §. 1. de deſponſ. impub. in Sext.

(*g*) Præal. c. in princ. & ibi gloſſ. Dominic. & Franc. & alii.

(*h*) d. gloſſ.

(*i*) Abb. in c. fin. de Sponſal. extra. Lib. 1. conſil. matrim. conſil. ibidem 17. nu. 6, 7. Gloſſ. & DD. in c. 1. §. 1. de deſponſ. impub. Lib. 6. Paris. conſil. 51. & conſil. 62. vel 4. Soarez. Theſaur. com. opin. verb. Sponſalia. nu. 163. & ibi Baptiſta à Villalob verb. Sponſalia, nu. 91. *& eſt communis opinio, licet eam ægrè ferant*, Covar. prima parte de Sponſ. c. 4. §. 2. nu. 4. & Molin. in addic. ad conſil. Dec. 368. quos videas.

(*k*) Dec. conſil. 368. & clariùs Pariſ. d. conſ. 51. vol. 4. nu. 11. Card. in c. de illis. el. 1. de deſponſ. impub. extra. nu. 1.

(*l*) Henr. Boic. in c. Atteſtationes de deſponſ. Impub. extra verſic. Item fallit, Menoch. de præſump. libr. 3. præſumpt. 2. nu. 26.

(*m*) c. de illis el. 1. de deſponſ. impub. in princ. & ibi gloſſ. verb. ullatenus, & Card. in princ. de c. & in fin. & c. à nobis eod. tit. & ibi Panor. nu. 2.

I will take thee, &c.) do not paſs from *Sponſals* to *Matrimony* by any the means aforeſaid, or by any other Act, other than by the very Act of Carnal Knowledge of the Parties ſo betroathed (*n*): So that the endeavour to perform the Act is not ſufficient in this Caſe (*o*), which in the other Caſe is alone ſufficient without accompliſhment of the Act (*p*).

(*n*) c. fin. de Sponſal. extra. & ibi Panor. & DD. Dominic. & Franc. in c. unic. de Sponſal. §. 1. lib. 6. Henr. Boic. in c. Atteſtationes de deſponſ. Imp. extra. Dec. conſ. 368. Pariſ. conſil. 51. nu. 8. lib. 4. & Covar. Tract. de Sponſal. prima parte. c. 4. §. 2. nu. 2. (*o*) d. c. fin. de Sponſal. extra. & ibidem DD. maximè Panor. & Præpoſ. ibidem lib. 1. conſil. matrim. conſil. ibidem 86. nu. 23, 24. (*p*) c. Atteſtationes & ibi Præpoſ. & Henr. Boic. de deſponſ. impub. extra. Idem Præpoſ. in c. fin. de Sponſal. nu. 3. & Cardinal. nu. 2. eod. c. fin.

8. Fifthly, By the Laws of this Realm (as I take it) if a Woman, during her Minority, be married to a Man ſeized of Lands or Tenements in Fee-ſimple, or Fee tail, by Purchaſe or Diſcent, ſhe ſhall be endowed of the third part of ſuch Lands and Tenements, ſo that ſhe have accompliſhed the Age of *nine* years at her Husbands death (*q*).

(*q*) Fitzherbert Na. Br. fol. 149. l. Littleton. Tit. Dower. in prin. Kitchin fol. (mihi) 160, 161.

SECT.

SECT. VIII.

Divers Queſtions about Marriages or Spouſals contracted by Children.

1. THE Queſtions which I ſpeak of, and which are now to be propounded, are of divers ſorts (*a*) by occaſion of the divers Circumſtances (whereby the Caſe, and conſequently the Law is altered) incident to this Matter; for ſometimes the Parties, which are betroathed are both *under Age*, and ſometimes th'one of them in *Minority*, and th'other of *ripe and perfect Age*: Wherefore we will firſt handle ſuch Queſtions as belong to the firſt Caſe, then thoſe which belong to the ſecond Caſe, and thirdly thoſe Queſtions which belong to *both* Caſes.

(*a*) Vide Summam Hoſtienſ. Tit. de deſponſ. impub. §. fin. & Covar. Tract. de Sponſal. prima parte, c. 4. & 5.

2. Firſt, When the Parties betroathed are both of them Children at the time of the Contract, then this Queſtion may be demanded, Whether that Party which firſt cometh to lawful Age, may then *diſſent*, or muſt ſtay and expect till the other Party likewiſe come to lawful years (*b*): Many are of this Opinion, That he or ſhe who firſt cometh to ripe Age, muſt ſtay until the other Party attain to ripe Age alſo, and cannot in the mean time diſſent; or diſſenting or diſclaiming in Deed, yet this diſclaimer is not to be heard, nor this diſſent regarded, the other Party yet ſtanding in Minority (*c*). Others are of a contrary Judgment, affirming, That it is not only lawful for that Party, who firſt

(*b*) de hac Q. DD. in c. de illis. el. 1. de deſponſ. impub. extra. Covar. de Sponſ. prima parte c. 5. §. fin.

(*c*) Gloſſin d. c. de illis & Summar. ibidem in medio, Schneidwin. tract. de nuptiis. fol. 32. nu. 13. Conſil. matrim. lib. 1. conſil. ibidem 14. n 3.

cometh

cometh to lawful Age, to diſſent (*d*), but alſo that it is neceſſary ſo to do (*e*), even ſo ſoon as he or ſhe ſhall firſt reach unto this lawful Age, or incontinently after (*f*); otherwiſe he or ſhe, by not diſſenting, ſhall be deemed to have *ratified* the former Contract, at the leaſt for his or her own part, and to have referred the matter to the power and election of the other Party to confirm or infirm the ſame (*g*). And this Opinion, namely, That the Party who firſt cometh to lawful Age may then *diſſent*, is imbraced of the moſt part, as the truer Opinion (*h*). The Reaſon in my Conceit is very plain; for ſeeing it is granted by them which hold the former Opinion, That even that Party which firſt cometh to lawful Age may then diſſent, when the younger Party cometh to the ſame Age (*i*); in vain then, and to no purpoſe is this expectation, whereof there is no effect (*k*).

(*d*) Panor. Boic. & Præpoſ. in d. c. de illis, el. 1. Hoſtienſ. Summa Tit. de deſponſ. impub. §. fin. verſic. *ſi verò impubes quorum opinio communis eſt.* Teſte Covar. Tract. de Sponſal. prima parte, c. 5. §. 1. nu. 2.

(*e*) Hoſtienſ. Boic. & Præpoſ. ubi ſupra, & *hæc opinio communis eſt ejuſdem* Covar. *teſtimonio, loco quo ſupra.*

(*f*) Henric. Boic. in d. c. de illis el. 2. de deſponſ. impub.

(*g*) Summa Hoſtienſ. Tit. de deſponſ. impub. §. in fin. verſic. Sed ſi alter. Henr. Boic. in d. c. de illis. verſic. unde quando. Præpoſ. eodem c. nu. 1. verſ. & ideo. (*h*) Teſte Covar. in Tract. ſuo de Sponſal. prima parte, c. 5. §. 1. nu. 2. Summa Silveſtrin. Tit. de Sponſal. q. 3. in fin. (*i*) Gloſſ. in c. de illis el. 1. de deſponſ. impub. extra. verb. minoris ætat. ibi Tu. dic. (*k*) Panor. Boic. Hoſtienſ. & Præpoſ. in d. c. de illis 1. Covar. Tract. de Sponſal. prima parte, c. 5. §. 1. nu. 2. Summa Silveſtr. verb. Sponſal. q. 3. in fin.

3. This Concluſion therefore, That the Party which firſt cometh to lawful Age may *diſſent* during the others Minority is extended, and doth proceed, albeit the Contract were made by words of preſent time, or the *Marriage ſolemnized* in the face of the Church (*l*): But in theſe Caſes following this Concluſion is *limited*, namely, when after the Contract or Marriage the Parties know each other *Carnally*; for then though both the Parties ſhould diſſent, the Contract or Marriage conſummate cannot be diſſolved (*m*); or if the Party, being

(*l*) Covar. Tract. de Sponſal. prima parte, c. 5. §. 1. in prin. poſt. Præpoſ. & alios in c. de illis el. 1. de deſponſ. impub. extra.

(*m*) Henric. Boic. in c. Atteſtationes de deſponſ. impub. extra. verſic. aut per tacitum, &c. Panor. in c. à nobis. eod. Tit. in fin. Præpoſ. in d. c. Atteſtationes nu. 5 Schneidwin. tract. de nuptiis, fol. 32. n. 13. in fin.

near

near full Age, and of discretion to understand the nature and peril of an *Oath*, did swear to perform the Contract (*n*); or if the Party which first came to ripe Age did not by and by, but a good space after disclaim (*o*), in those Cases also the elder is to expect until the younger come to ripe Age, nor is to be licensed to marry elsewhere in the mean time (*p*).

(*n*) c. ex literis el. 2. de Sponsal. extra. & ibi Panor. & DD. *quorum opinio communiter est recepta referente* Covar.

Tract. de Sponsal. prima parte, c. 5. §. 1. n. 3. *quem videas de hac re copiosè differentem in utramque partem.* (*o*) Henr. Boic. in c. de illis el. 1. de desponsat. impub. extra. versic. aut quilibet. Præpos. in c. Attestationes eod. tit. nu. 4. (*p*) Hostiens. Summa. Tit. de desponsat. impub. §. in fin. versic. sed si alter. Boic. & Covar. ubi supra.

4. The second Question concerning the first Case, (namely, when both the Parties betroathed are under Age) shall be this, What if the Parties during their *Minority dissent*, yet immediately after they be come to lawful years, do both of them express their mutual Consent by *Conjectures* only (as by *Kissings, Embracings, Gifts, &c.*) afterwards the one of them alone dissenteth, and marrieth a third Person, and doth consummate the same by Carnal Knowledge; Whether is this Marriage good in Law?

5. To this Question thus, If the former Contract were made by words of *Future time* (as, *I will take thee, &c.*) then the Marriage is good (*q*) albeit not consummate (*r*); the reason is this, more is not confirmed than was at the first contracted (*s*), that is Spousals *de futuro* properly so called, both because in form of words, and in the intent of the Parties they were so. But Spousals *de futuro*, albeit contracted by them of full Age, are taken away by Spousals *de præsenti* (*u*). And therefore in our Case the Marriage is good, notwithstanding

(*q*) c. 1. de matr. contr. interdict. Ecclesiæ, & ibi Panor. (*r*) d. c. 1. de matr. contr. interdict. Ecclesiæ, *in qua nulla fuit mentio copulæ, sed nuptiarum tantum cum tertio*, Adde C. pen. de

Sponsal. extra. & DD. ibidem. (*s*) Baleus in l. 3. C. si adversus rem judicat. in fin. (*t*) Paris. consil. 51. vol. 4. Dec. consil. 468. Gem. & Franc. in c. unic. §. 1. de desponsat. impub. lib. 6. (*u*) c. sicut c. penult. de Sponsal. extra. & DD. ibidem.

the

the Spouſals contracted in Minority, and confirmed afterwards (*x*). And this I take to be true, albeit the former Spouſals had been confirmed by giving and receiving a *Ring* (*y*).

(*x*) c. 1. de matr. contr. interdict. Eccleſiæ, & ibi DD. Corſet. ſing. verb. matrim. 178. Abb. & Præpoſ. ibidem Pariſ. conſil. 62. vol. 4. c. 4. §. 2. nu. 2. DD. in c. fin. de deſponſ. impub. extra.

(*y*) Covar. tract. de Sponſal. prima parte,

6. But if the former Contract were made by words of *preſent time* (as, *I do take thee, &c.*) then the Marriage, albeit conſummate, is not good (*z*). The Reaſon is, becauſe this former Contract being in truth *Matrimony*, if we regard either the form of words, or intent of the Parties (*a*) and Spouſals only by interpretation of Law (*b*), becauſe of the inſtant defect of perfect Conſent, which perfect Conſent in due time once had, and the ſame mutually expreſſed, and ſo the former Contract thereby confirmed and ratified, is of no leſs force or efficacy than is the Contract of Spouſals *de præſenti*, made betwixt Perſons of perfect *Age* (*c*), which cannot be diſſolved by a ſecond Marriage conſummate with Carnal Knowledge, and Procreation of Children (*d*). As for the firſt Circumſtance of this Inſtance, namely, The diſſent of the Parties betrothed during their Minorities, it is not of any value (*e*): The Reaſon is, becauſe of the inconſtancy and mutability of Children; for to day they will, to morrow they will not; the third day they will, and they will not, and ſo every day, In Dock out Nettle, until they come to years of diſcretion (*f*); and therefore worthily in the mean ſeaſon are their unſtable and doubtful diſſents not regarded. By the Solution of this ſecond Queſtion we may the better aim at

(*z*) c. unic. §. 1. de deſponſ. impub. lib. 6. & ibidem Gem. & Phil. Franc. & alii. Soarez. Theſaur. com. Op. verb. Sponſalia nu. 163. Card. in c. de illis el. 1. de deſponſ. impub. extra & clarius pro Pariſ. conſil. 51. vol. 4. quod videas.

(*a*) Gem. Franc. Anchor. & Jo. Andr. in c. unic. §. 1. de deſponſ. impub. in Sext. Pariſ. ubi ſupra. & Phil. Dec. conſil. 168.

(*b*) DD. in d. §. 1.

(*c*) Pariſ. & Dec. ubi ſupra. & DD. in d. c. unic. §. 1. de deſponſ. impub. in Sext.

(*d*) c. fi inter. & ibi Panor. Card. & alii. de Sponſal. extra. quorum opinio eſt communis, Teſte Kirkhovio. Theſaur. com. op. verb. Matrimonium.

(*e*) Hem. Boic. in. c. Atteſtationes. de deſponſ. impub. extra. Summam Hoſtienſ. Tit. de deſponſ. impub. §. fin. verſic. Sed pro Deo.

(*f*) Summa Hoſtienſ. Tit. de deſponſ. impub. §. fin. verſic. Sed pro Deo.

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the Anſwer to a third Queſtion propoſed e're while about Infants, *viz.*

7. If two *Infants* do contract Spouſals by words of *preſent time*, confirming the ſame by divers Conjectures, not only after they have exceeded their Infancy, but alſo after they have attained to full and perfect Age, Whether this Contract ought to be judged as Spouſals *de futuro*, or *de præſenti* (*g*): For though by the Common Opinion this Contract thus confirmed is become very *Matrimony* (*h*): Yet is it certain that divers of great Authority do hold the contrary (*i*), grounding their Aſſertion upon this Reaſon eſpecially, Becauſe the Text of the Law, whereby it is provided, That Spouſals may become Matrimony by other Signs and Conjectures than by Carnal Knowledge, doth ſpeak in theſe terms only, where the Spouſals are contracted by thoſe Children which have paſſed their Infancy (*k*), and which are not void at the beginning, as are the Spouſals contracted by *Infants* (*l*); and therefore, that it were abſurd (*m*) to extend the matter from Spouſals, which are ſomething, to Spouſals which are not any thing. Howbeit the common Opinion (beſides that it is of more authority, and tending to the favour of Matrimony) ought therefore to be preferred (*n*), it is neither abſurd nor deſtitute of reaſon; for ſeeing the Act confirmatory, is not otherwiſe to be underſtood, than according to the nature of the words of the Act confirmed (*o*),

(*g*) Hoſtienſ. ubi infra Arg. l. cum non ſolum §. filiis, & §. ubi autem, C. de Bonis quæ lib. L. dubium C. de repub. *Sed quid ſi malitia ſupplet ætatem? videtur adhuc etiam nihil operari diſſenſum vel conſenſum.* Covar. de Sponſal. prima parte, c. 4. §. 2. nu. 4. verſic. hæc tamen poſt. Ruin. conſil. 203. vol. 1. Boic. in c. puberes de deſponſ. impub.

(*h*) Archid. in c. ult. 30. q. 2. Dominic. & Phil. Franc. in d. c. unic. §. 1. de deſponſ. impub. in Sext. Deciſ. Rot. 462. Covar. in tract. de Sponſal. prima parte, c. 4. §. fin. in fin. ubi refert hanc op. eſſe com. (*i*) Jo. Andr. in d. c. unic. §. 1. Henric. Boic. in c. Atteſtationes. de deſponſ. impub. extra. col. pen. Collector. deciſ. Rot. in nov. 462. Covar. Tract. de Sponſal. prima parte, c. 4. §. 2. in fin. Menoch. de præſump. Lib. 3. præſump. prima. nu. 66. (*k*) Text. in d. c. unic. de deſponſ. impub. in Sext. §. 1. & ibi Jo. Andr. (*l*) l. in Sponſal. ff. de Sponſal. d. c. unic. in princ. & DD. ibidem. (*m*) Henr. Boic. in c. atteſtat. de deſponſ. impub. extra. col. penul. verſic. Aut per aliud. (*n*) Vide Coraſ. Tract. de communi opinione lib. 3. caſ. 20. (*o*) Bald. in l. 3. C. ſi adverſus rem judic. in fin. Dominic. poſt Anto. in c. unic. §. 1. de deſponſ. impub. & Phil. Franc. ibidem.

the words being *de præſenti*, the Contract confirmed is to be adjudged accordingly, that is, as Spouſals *de præſenti* (*p*).

(*p*) Gem. & Phil. Franc. ubi ſupra.

8. When the Caſe is ſuch, That one of the Parties betrothed is of *full Age*, the other in *Minority*, then this Queſtion may be demanded, Whether that Party which is of full Age ought to expect until the other come to full Age likewiſe? or if the elder will not ſtay, but marry a third Perſon during the minority of the younger, Whether is this Marriage good, yea or no?

9. There is no queſtion, but that the Party which is of full Age *ought to ſtay*, being ſo commanded by the very Text of the Law, and prohibited to marry elſewhere (*q*). But, if contrary to this Prohibition, the ſame Party do adventure in deed to marry a third Perſon, during the minority of the other Party, by the Opinion of the moſt and beſt Learned in the Laws Eccleſiaſtical, this Marriage now done *is good* (*r*), for *multa prohibentur fieri quæ tamen facta convaleſcunt* (*s*), many things are forbidden to be done, which notwithſtanding being done, are available in Law.

(*q*) c. de illis el. 1. §. mulier autem. de deſponſ. impub. Summa Hoſtienſ. Tit de deſponſ. impub. §. fin. in princ. Schneidwin. Tract. de nuptiis, fol. 32. nu. 14.

(*r*) Hoſtienſ. Summa. Tit. de deſponſ. impub. §. fin. col. pen. verſic. quid ſi pubes. deciſ. Rot. 450. in Nov. Schnedwin. Tract. de nuptiis, fol. 32. nu. 14. Covar. Tract. de Sponſal. prima parte, c. 5. §. 2. nu. 7. Præpoſ. in c. de illis el. 1. nu. 4. de deſponſ. impub.

(*s*) c. nec illud. 30. q. 5. deciſ. Rot. 450.

10. And this Concluſion proceedeth not only when the former Contract is made by words of *future* time (as, *I will take thee*, &c.) but alſo when it is made by words of *preſent time* (as, *I do take thee*, &c.) (*t*) the Reaſon is, becauſe this Contract which is made by words of preſent time betwixt two Parties, whereof the one is of full and perfect Age, the other but a Child, is underſtood to be *meer Spouſals* in reſpect of both Parties, and not Matrimony in reſpect of the elder, and Spouſals

(*t*) deciſ. Rot. 450. & Præpoſ. in c. de illis el. 1. nu. 4. de deſponſ. impub. *referens hanc opinionem eſſe communem.*

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in reſpect of the younger (*u*). The reaſon of this reaſon is, becauſe ſuch is the nature of Matrimonial Contracts, as it always requireth a *mutual and equal* harmony or agreement betwixt either party; neither can abide to halt or ſuffer that the one Party be tied, and the other at liberty (*x*); like as it is in Correlatives, whereof the one cannot conſiſt without the other. And therefore it is no more poſſible that this Contract ſhould be Matrimony in the one Party, and Spouſals in the other Party, than it is poſſible for a man to be a Husband without a Wife, or for a Woman to be a Wife without a Husband (*y*): Indeed the elder party, which marrieth againſt the Prohibition of the Law, is puniſhable (*z*), but the Marriage paſt, is not now revocable by the former Contract, having no greater force than Spouſals *de futuro* (*a*).

(*u*) c. fin. de deſponſal. impub. extra. Covar. Tract. de Sponſal. c. 5. §. 2. nu. 5. verſic. hinc conſtat. deciſ. Rot. 450. Præpoſ. in d. c. de illis el. 1. *ubi dicit hanc eſſe concluſionem auream.*

(*x*) Hoſtienſ. Summa de deſponſ. impub. §. fin. verſic. quid ſi pubes.

(*y*) Hoſtienſ. ubi ſupra.

(*z*) c. 1. de matr. contr. interd. Eccleſ.

Henr. Boic. in c. præterea de Sponſal. extra ubi diſtinguit. (*a*) Præpoſ. in c. de illis el. 1. de deſponſ. impub. nu. 4. deciſ. Rot. 450. DD. in c. unic. §. 1. de deſponſ. impub. in Sext.

11. The ſecond Queſtion belonging to this ſecond Caſe ſhall be this, Two Perſons contract Spouſals by words of preſent time, the one of them only then being of ſufficient Age, the younger afterwards coming to years of conſent doth ratifie and confirm the Contract, but the elder then *diſſenteth* and marrieth a third Perſon, Whether is this Marriage good, yea or nay?

12. Some incline to this Opinion, That the Marriage is not good (*b*), ſuppoſing that it is not in the power of the Party, which was of full Age at the time of the Contract, to diſavow the ſame Contract at any time after; but that it is in the Election of the younger Party only to conſent or diſſent, as ſoon as he or ſhe ſhall attain to lawful Age (*c*): Like as in other Covenants and Bargains, where if one of lawful Age make

(*b*) Summa Silveſtr. verb. Matrimon. 5. q. 8. Goſadin. conſ. 2. nu. 11, 27, 28.

(*c*) Silveſter. & Goſadin. ubi ſupra.

a Contract or Bargain with another during his Non-age, this Contract is good againſt the Perſon of full Age (*d*), to whoſe folly it is imputed, that he would enter into Covenants, or become bound to one under Age (*e*), but not againſt the Minor, who may better his Eſtate, but not make it worſe by any Bonds or Covenants (*f*). Others notwithſtanding are of a contrary Judgment (*g*), eſteeming that the former Contract of Spouſals can never be reſolved, or changed into Matrimony, otherwiſe than by a new and mutual Conſent of either Party, expreſſed by Word, or inſinuated by Deed, after they are both of lawful Age (*h*): And that in the mean time, and until this new Conſent of both the Parties be expreſſed, the former Contract is not of any greater force or efficacy than Spouſals *de futuro* (*i*), and therefore unable to impugn a ſecond Contract of Marriage (*k*): And this Opinion, in my conceit, is the truer, and more agreeable to the Text (*l*).

(*d*) Inſtit. Tit. de authoritate Tut. in princ.
(*e*) L. qui cum alio. de Reg. Jur. ff. & ibi DD.
(*f*) Inſtit. de authoritate Tut. in princ. C. de contrahend. & committend. ſtipulat. L. neque, & L. 1. C. author. præſtand.
(*g*) Covar. Tract. de Sponſal. prima parte, in fin. per c. 1. §. 1. de deſponſ. impub. in Sext. deciſ. Rotæ 150. Schneidwin. Tract. de Nuptiis, fol. 32. & alii.
(*h*) c. 1. §. 1. de deſponſ. impub. in Sext. & ibi Gem. Franc. & alii.
(*i*) c. fin. de Sponſal. extra. Præpoſ. in c. de illis el. 1. de deſponſ. impub. extra. & ibi Henr. Boic. & alii.
(*k*) c. penul. de Sponſal. extra. Deciſ. Rot. 450. Covar. Tract. de Sponſ. prima parte, in fin. quem velim. videas.
(*l*) c. unic. §. 1. de deſponſ. impub. in Sext. & Covar. ubi ſupra. Co. Inſt. fol. 79. b.

13. The other Queſtions common to both Caſes (that is, in caſe both the Parties be under Age, or in caſe the one of them only) are theſe, *viz.*

Whether the Parties contracting Matrimony in Minority are preſumed to conſent and to ratifie the ſame, if ſo be, when they, or either of them, attain to years of conſent, they do not expreſly diſſent from or diſclaim the former Contract?

Item, By what Signs or Conjectures this Conſent is proved?

Item, Before whom, and at what time the Parties are

are to disclaim, in case they, or either of them, do dislike of the former Contract?

14. For the first Question, it may seem, That unless the Parties do expressly dissent, they are presumed to consent, and thereby to confirm the Marriage contracted during Minority; for it is a Rule of the Law, *Qui voluntatem mutatam dicit, hoc probare debet* (*m*), whoso affirmeth one's mind to be changed, must prove the same: Howbeit the contrary is rather to be established in this place, namely, That this Consent is not hereby presumed, by reason of another more special Text, speaking in the terms of our Question, which saith, *Nisi per Carnis Copulam vel aliquem modum aliunn eosdem contrahentes, cum ejusdem perseverantiâ voluntate, ad pubertatis tempora perveniſſe, constiterit & evidenter, Matrimonium* (*quod, ut Matrimonium, non tenuit ætate prohibente*) *per lapsum dicti temporis non convaleſcit* (*n*); unless it shall appear evidently by Carnal Knowledge, or some other means, that the same Persons contracting do come to ripe Age with continuance of the same Will, the Matrimony (which held not as Matrimony, young Age prohibiting) is not made forcible by Lapse of the time: Wherefore seeing the Law doth specially require an evident proof of continuance of good Will, or Consent, by Carnal Knowledge, or other means, the general presumption of perseverance, grounded in the former Rule, is not sufficient in this Case (*o*).

(*m*) L. enim qui. ff. de probac. Mascard. Tract. de probac. concl. 14, 16.

(*n*) c. unic. §. 1. de desponſ. impub. lib. 6.

(*o*) *Nam ubi lex requirit aliquid probari quod alias præſumitur, non acquieſcit illi ſimplici juris præſumptioni.* Arg. L. pen. ff. de Var. & extraord. cogni. Menoch. de præſump. Lib. 5. c. 1. nu. 36. Covar. Tract. de Sponſal. prima parte, c. 4. §. 2. nu. 4. verſic. ſecundo Matrimonio, Gem. in c. 1. §. 1. de desponſ. impub. in Sext. not. 4.

15. Others concerning this Question make a difference, Whether the Parties do *cohabit* or dwell together, yea or no (*p*)? If they dwell together in one House, then

(*p*) Summa Hostienſ. Tit. de desponſ. impub. §. ult. verſic. Quid ſi pubes. gloſſ. in c. literas. de desponſ. impub. extra. gloſſ. in c. ubi. 30. q. 2.

then it is needful that they expreſs their diſſents, otherwiſe by this their *Cohabitation* they are preſumed to yield their mutual Conſents, and to ratifie and confirm the Marriage before contracted (*q*), which Concluſion is enlarged diverſly.

(*q*) c. ad id quod. de Sponſal. c. Inſuper. Qui matr. accuſ. poſſ. c. ſignificavit. de eo qui duxit in ux. quam. pell. & ibi DD. lib. 1. conſil. matrim. conſ. ibidem. 53. nu. 7. L. minorem. ff. de ritu nup.

16. Firſt, Whether the Houſe be his or hers, or any others (*r*), by this the mutual *Cohabitation* in any of them, this Conſent is preſumed (*s*).

17. Secondly, Albeit either of the Parties, during their Minority, were conſtrained by fear to marry, (by reaſon whereof the ſame was utterly void)(*t*), yet by *Cohabitation* after years of Conſent, this fear is purged, and the Marriage confirmed (*u*).

(*r*) Phil. Franc. in c. unic. §. 1. de deſponſ. impub. lib. 6. (*s*) Gem. & Franc. in d. §. 1. (*t*) c. cum locum. de Sponſal. extra. & infra. (*u*) c. Inſuper. Qui matr. accuſ. poſſ. c. ad id quod. de Sponſal. extra Covar. Tract. de Sponſal. ſecunda parte, c. 3. §. 6.

18. Thirdly, Albeit the Parties did not *cohabit* together by the ſpace of a year or more, but for ſome few Months or Days (*x*), after their coming to lawful Age, yet by this ſhort *Cohabitation* as Man and Wife, they are preſumed to yield their Conſent, and to confirm the former Contract (*y*): And albeit in the Text there be mention of Cohabitation by the ſpace of a year and a half (*z*), yet this certain time is ſet down, not becauſe there is any Myſtery of Law thereby ſignified, but becauſe it did ſo fall out in the Fact there deſcribed (*a*).

(*x*) *Immo vel minus Diei ſpontanea Cohabitatio purgat metum inquit*, Præpoſ. in c. ad id quod. de Sponſal. extra. nu. 3. *Crederem tamen, ipſo Judicis arbitrio relinqui, quantum temporis ſufficiat ad purgandum metum.* Henr. Boic. in c. cum locum. de Sponſal. extra. & Panor. in d. c. ad id quod. nu. 4. (*y*) Hoſtienſ. Panor. & Præpoſ. in d. c. ad id quod de Sponſal. extra. & Cardinal. ibidem, *ubi diſtinguit inter matrimonium metu contractum & matrimonium inter impuberes celebratum.* (*z*) Text. in d. c. ad id quod. (*a*) Panor. & Præpoſ. eod. c. ad id quod.

19. Howbeit it is not perpetual, that the Parties betrothed or married, dwelling together after their Minority

rity expired, are thereby presumed to yield their mutual Consents: For if this *Cohabitation* be coacted, not voluntary, it worketh no such presumption (*b*); or if this *Cohabitation* continue divers years, yet if the disliking Party have not the opportunity of safe Escape, belike it doth not make any such presumption of Consent against the Party thus straitly kept (*c*), expressing his or her dissent from time to time (*d*), and proving the impediment, albeit also the Party were *earnally known* (*e*).

20. If the Parties betrothed or married, do not cohabit or dwell together, then I suppose that this Consent is not presumed by lapse of time only, albeit the Parties do not expresly dissent (*f*), and therefore that it must be proved by the Party which affirmeth it, not by the Party which denieth it (*g*); I mean of such a Consent, whereby the former Contract, having the form of Spousals *de præsenti*, contracted by Children (and therefore by interpretation of Law Spousals *de futuro*) are resolved into Matrimony (*h*). As for that Consent whereby the former Contract shall still prevail as meer *Spousals*, that was presumed from the beginning, and is still presumed to continue, albeit the Parties dwell not together, but far asunder (*i*), unless they, as soon as they attain to lawful years, do express their dissent, and do disclaim from the former Contract (*k*).

(*b*) c. insuper. Qui matr. accuss. poss. extra. (*c*) Gloss. in d. c. Insuper. Everard. consil. 19. quod etiam extat in lib. 2. consil. matr. consil. ibidem. 4. nu. 34. Mascard. Tract. de probac. concl. 1054. nu. 30, 34. (*d*) d. c. Insuper & ibidem gloss. (*e*) Gloss. & DD. in d. c. Insuper. (*f*) Hostiens. Summa Tit. de desponsi. impub. §. fin. versic. quid si pubes. c. unic. §. 1. de desponsi. impub. lib. 6. Covar. Tract. de Sponsi. prima parte, c. 4. §. 2. n. 3. versic. secundum Matrimonium.

(*g*) l. 2. ff. de probac. (*h*) d. c. unic. §. 1. de desponsi. impub. in Sext. (*i*) c. ex literis. el. 2. de Sponsal. extra Boic. in c. de illis. el. 1. de desponsi. impub. col. 2. Boic. in d. c. in d. c. de illis. & in c. Attestationes. de desponsi. impub. (*k*) Boic.

21. Concerning the second Question, namely, by what *Signs* or *Conjectures* this aforesaid Consent is proved, whereby the Marriage contracted during the Minority of both the Parties, or of the one of them, is confirmed.

I ſaid a little before (*l*), That by what means Spouſals contracted during *infancy*, are afterwards confirmed, when the Parties ceaſe to be Infants; by the ſame means is the Marriage confirmed which was contracted during Minority, after the Parties come to years of diſcretion (*m*). Which Concluſion, many (I confeſs) do deny to be ſimply true; namely, concerning thoſe not ſo ſtrong Conjectures, *viz.* of *Kiſſings*, *Embracings*, *giving and receiving of Tokens*, the ſaluting or naming of each other by the Names or Titles of *Husband and Wife*, &c. (*n*) whereby Spouſals contracted by Infants are afterwards confirmed (*o*). In which Controverſie, whether Opinion ought rather to be received, we may the better diſcern, if we ſhall firſt view the Reaſons and Authorities of either Party.

(*l*) ſupra §. 7. paulo ante finem.

(*m*) gloſſ. in c. unic. §. 1. de deſponſ. impub. lib. 6. & ibi Gem. & Franc. Abbas in c. fin. de Sponſal. extra. quam opinionem communiter receptam aiunt, Pariſ. conſ. 51. & conſ. 52. vol. 4. Baptiſta à Vallalob & Soarez. Theſaur. com. opinio. verb. Sponſalia ille; nu. 91. hic; nu. 163. lib. 1. conſil. matr. conſil. ibidem 17. nu. 6, 7. Dec. conſil. 368. (*n*) Covar. tract. de Sponſal. prima parte, c. 4. §. 4. nu. 4. Carol. Molin. in addic. ad Dec. conſil. 368. (*o*) gloſſ. & DD. in c. unic. de Sponſal. lib. 6. in princ.

22. This in the mean time is without Controverſie, That if the Parties, after they be come to lawful years, being then free from former Contracts, do by plain and direct words, without fear or fraud, expreſs their mutual Conſents; as if they ſay [*We do ratifie and confirm the Marriage contracted betwixt us*, &c.] the Marriage (which before was no more but Spouſals *de futuro*, in conſtruction of Law) is now made true and undoubted Matrimony (*p*). This alſo is without Controverſie, That if the Parties willingly, or of their own accord know each other *carnally*, the Marriage before contracted in their Minority, is from henceforth of no leſs force in Law, than if the ſame were now again contracted by

(*p*) Henric. Boic. in c. Atteſtationes. de deſponſal. impub. extra. col. 2. verſic. Ant. per expreſſum. Summam Silveſtr. verb. Matrimonium 5. q. 8.

words

words of the *present time*, during their lawful Ages (*q*). By voluntary *Cohabitation* likewise, (*r*) (as I have before declared) and by *Subarration*, or giving and receiving of Rings (*s*), (as hereafter shall be shewed) (*t*), is this former Contract, having but the form of Marriage, indued with the virtue and very nature of true substantial Matrimony (*u*): And generally by whatsoever means Spousals *de futuro*, contracted by them of perfect Age, are resolved into Matrimony (*x*): The Reason is, because if there be any means of such power and virtue, as thereby those Spousals *de futuro* (which have neither form of Matrimony, nor intention of the Parties when they were first made) are distilled into Matrimony, much more easily by the strength and operation of the same means, are those Spousals converted into Matrimony, which both by form and intention of the Parties were Matrimony from the beginning (*y*).

(*q*) c. insuper. qui matr. accus. poss. & ibi Panor. & Præpos. Henr. Boic. in d. c. Attestationes.

(*r*) c. ad id quod. de Sponsal. extra. & ibi gloss. & DD.

(*s*) gloss. Panor. & Præpos. in c. fin. de desponsa. impub. & in c. Tenor. de Reg. Jud. extra.

(*t*) infra §. 15.

(*u*) Covar. tract. de Sponsal. prima parte, c. 4. §. 2. nu. 4. vers. Ego. Præpos. in c. fin. de desponsa. impub. extra. nu. 4. in fin. Paris. consil. 51. nu. 1. vol. 4.

(*x*) Covar. ubi supra Henr. Boic. in c. Attestat. de desponsal. impub. extra. col. pen.

(*y*) Henr. Boic. in d. c. Attestationes.

23. Wherefore concerning these proofs, wherein there is not any Controversie, I will not enter into any further discourse, but return to those other more feeble Conjectures of *Kissings*, *Embracings*, *giving and receiving of Tokens*, &c. which divers do reject, as altogether insufficient in this behalf, admitting no other Conjectures herein, but such as are evident and urgent, and equivalent to the presumption of *Carnal Copulation* (*z*). Their Reasons are,

(*z*) Covar. tract. de Sponsal. prima parte, c. 4. §. 2. nu. 4. Molin. in apostill. ad Dec. consil. 462.

First, Because the very Text (as we heard) requireth that this Consent, whereby Spousals are turned into Matrimony, do appear *evidenter*, evidently (*a*).

(*a*) Text. in c. unic. §. 1. de desponsal. impub. extra.

Secondly, Forasmuch as to contract Matrimony is a matter of far greater prejudice than to contract or con-

firm Spouſals, therefore the preſumptions ought to be ſo much the ſtronger to prove this Matrimonial Conſent, by how much the prejudice is greater that doth depend and may enſue of Matrimony, than of Spouſals (*b*).

(*b*) Covar. & Molin. ubi ſupra.

Thirdly, Becauſe theſe Amorous Actions of *Kiſſings and Embracings, Gifts, &c.* are often practiſed as Preambles and Allurements rather to accompliſh the accompliſhment of unlawful Luſts, and to quench the Flames of Youthful Deſires, than to tye the indiſſoluble Knot of chaſt Wedlock, or to undergo the perpetual Burthen of ſo weighty a Charge (*c*).

(*c*) vide Maſcard. de probac.

24. Howbeit thoſe, or whatſoever other Reaſons not unprobable, nor lightly to be eſteemed, to the contrary notwithſtanding, the affirmative Sentence, *viz.* That theſe former Conjectures are *ſufficient*, is moſt commonly received, both of the ancient (*d*) and later Writers (*e*), as the more ſafe Opinion in this conjectural State (*f*), becauſe it is more ſafe to judge *for Matrimony* than againſt Matrimony (*g*), and leſs danger to joyn them that are not Man and Wife, than to ſeparate them which are Man and Wife (*h*). And ſo the Law not preſcribing any certain Conjectures, but allowing any other means, as well as Carnal Knowledge, for proof of this Conſent, or perſeverance of former good Will (*i*), it was thought moſt reaſonable, of the moſt part, to admit thoſe Signs, or thoſe Conjectures, for teſtimony thereof, which are moſt commonly uſed in this Caſe by thoſe Perſons which faithfully intend to become Husband and Wife (*k*); amongſt which Signs and Conjectures, are there any more frequent than *Kiſſings, Embracings, Gifts, &c?* If none more uſual, Then what reaſon to reject them as inſufficient?

(*d*) Gloſſ. in c. unic. §. 1. de deſponſ. impub. lib. 6. & ibi Jo. And. Auch. & Gemin. Panor. in c. ult. de deſponſ. impub. extra.

(*e*) Pariſ. conſ. 51. vol. 4. dec. conſ. 468. Maſcard. de probat. concl. 1032. Menoch. de præſump. lib. 3. præſump. 1. nu. 64. Baptiſta. & Soarez. Theſaur. com. opin. verb Sponſal.

(*f*) *Hanc opinionem communem & ſecundum eam judicandum, pluribus fretus teſtimoniis oſtendit.* Maſcard. Tract. de probac. concluſ. 1032. nu. 1. & 2. (*g*) c. fin. de Reg. Jud. c. per tuas. de condic. appoſ. extra. (*h*) d.c. per tuas. & ibi gloſſ. & DD. (*i*) Text. in c. unic. §. 1. de deſponſ. impub. l. 6. (*k*) DD. in d.c. unic. §. 1. de deſponſ. impub. in Sext. Maſcard. Tract. de probac. concl. 1032.

Be-

Becauſe the Law requireth an evident proof, be it ſo; but lawful Conjectures are an evident proof, and ſo allowed by the Law (*l*). An evident proof, you'l ſay, to confirm Spouſals; And why not for the confirmation of Matrimony? Becauſe it is a matter of greater prejudice, you'l ſay, than Spouſals (*m*). Indeed thereupon it may be juſtly inferred, That thoſe Conjectures which prove not the confirmation of Spouſals, cannot prove the confirmation of Matrimony. But this Argument holds not; Spouſals are thereby confirmed, *Ergo* not Matrimony. If you crave an Inſtance, Spouſals are confirmed by Cohabitation (*o*), and yet by Cohabitation is Marriage confirmed alſo (*p*). Yea, but (you will ſay) theſe Amorous Gifts are too general, and abuſed to Luſt. An uncharitable Suppoſition, *delictum non præſumitur* (*q*). To conclude therefore, I ſubſcribe to the common Opinion: Nor am I of his mind, who more confidently than concludently affirmed the ſame to be as falſe, as common, and as dangerous as falſe (*r*).

(*l*) Barto. & alii, in L. licet Imperator ff. de Leg. 1. Menoch. de præſump. lib. 1. q. 45. *ubi vult hoc non ſolum in conjecturis legis, ſed etiam in conjecturis hominis.*

(*m*) *Hâc ratione nituntur;* Covar. & Molin. ubi ſupra.

(*n*) Arg. c. Cui de Reg. Jur. lib. 6. vide Sichard. in Rub. de Sponſal. C. nu. 15, 16, &c. Addic. ad Bart. in L. Oratio de Sponſ.

(*o*) c. unic. de Sponſal. extra.

deſponſ. impub. lib. 6. in princ. (*p*) Gloſſ. & DD. in c. ad id quod. de (*q*) c. per tuas de cond. app. & ibi gloſſ. & DD. (*r*) Molin. in addic. ad *Hanc tamen opinionem ſingularem Molinæi, contra communem approbat Gentilis.* fol. 506.

dec. conſil. 468. Tract. de Nuptiis,

25. The laſt Queſtion is, Before whom, and when, the Parties betrothed or married in Minority are to diſclaim, or to expreſs their *diſſent* in caſe they, or either of them, diſlike the Match?

In Anſwering whereof, I need not to be tedious, becauſe the matter is not contentious: This therefore in ſhort. The diſſent is to be made and publiſhed before the *Biſhop* of the Dioceſs where the diſliking Party dwelleth (*s*), or before his *Chancellor* (*t*), or in their

(*s*) c. de illis. el. 1. de deſponſ. impub. §. ſi verò. Hoſtienſ. Summa Tit. de deſponſ. impub. §. fin. verſic. Sed coram. Henr. Boic. in d. c. de illis. col. 2. verſ. iſta verò.

(*t*) c. 1. de frigid. & malef. extra. Hoſtienſ. & Boic. ubi ſupra.

abſence, before the *Parochial Paſtor* or *Miniſter*, and other honeſt Witneſſes (*u*). The time of manifeſting this diſſent, is ſo ſoon as he or ſhe ſhall attain to ripe Age, or years of Conſent (*x*); for to diſſent before that time, is to no purpoſe (*y*); and to prolong the ſame afterwards is dangerous (*z*). Now if any deſire to know when the Parties are ſaid to be of ripe Age, or of years of Conſent, let him read the next Paragraph.

(*u*) Arg. c. Si juſtus metus. de appell. &c. c. Paſtoralis. §. fin. de Offic. deleg. Hoſtienſ. d. §. fin. de deſponſ. impub. & Boic. in. d.c. de illis. eod. tit.

(*x*) Henr. Boic. d. c. de illis. de deſponſ. impub. quem videas. (*y*) Henr. Boic. eod. c. de illis. L. ejus ff. de Reg. Jud. (*z*) *Effuge cum poteris ne conſenſiſſe puteris.* Gloſſ. in c. ad id quod. de Sponſal. extra. *Item ſi factus major non contradicit, illico Spenſalia quidem confirmantur, licet non ad effectum Matrimonij, tamen ad effectum Sponſalicrum.* Gentilis Tract. de Nuptiis, fol. 506. Covar. Tract. de Sponſ. prima parte, c. 5. §. 1. nu. 2.

SECT.

SECT. IX.

Of Ripe or Lawful Age for Marriage.

1. THE third Age now to be considered is *ripe Age*, that is to say, that Age wherein it is lawful not only to contract Spousals, but also to Solemnize true, perfect, and indissoluble Matrimony, and thereby effectually to become Husband and Wife, both before God and his Church; which Age, when it doth begin, is now to be discussed. In the Explication whereof, it is not my meaning to enter into any Philosophical Discourse, by discovering what number of years the Ancient Philosophers, as *Plato* and *Aristotle* (whose chief regard was Natural Causes and Effects) did prescribe in this behalf; the one exacting of the Man Five and thirty years, and of the Woman Sixteen years (*a*); the other Seven and thirty years of the Man, and Eighteen of the Woman (*b*). Neither is it my purpose in Historical manner to dilate what number of years hath been prefixed for Marriage in former Ages, and Forreign Countries: As how *Lycurgus* (famous for his prudent Laws among the *Lacedemonians*) perceiving great Mischiefs did attend upon untimely Marriages (as the bad Agreement betwixt the married Couple, the great danger of the young Mother in Childbed, and the weak and wretched Issue, whereby the Commonwealth was rather weakned than strengthened) denied his Country Folks Marriage, until they had attained to full

(*a*) Plato lib. 6. de repub. lib. 4. de legib. Tiraquel. de legibus Connub. leg. 5. verfic. Plato.
(*b*) Aristoteles lib. 7. politic. c. 16. Covar. Tract. de Sponsal. secunda parte, c. 5. in princ. Tiraquil. de legibus Connub. Lege 5. verf. Aristoteles.

full ripeneſs of Years, ability of Body, diſcretion and conſtancy of Mind, likely to avoid all thoſe dangers (*c*). Or how (*M. Pappius Mutilus*, and *Q. Poppæus Secundus*, being Conſuls of *Rome*) Marriage was forbidden to Men above Sixty, and to Women above fifty years old (*d*), becauſe they were not able to benefit the Commonwealth by Procreation (*e*). Or how that Law, being called *Lex Pappia & Poppæa* (*f*), after thoſe two Conſuls, was afterwards aboliſhed by the Emperor *Claudius*, and liberty granted to old Men, albeit above Eighty years, to marry Women under Fifty (*g*); for that it was then thought not altogether impoſſible for a Man of that Age to beget Children (*h*); like as it is recorded of *Maſiniſſa* King of *Numidia*, who being Eighty ſix years old, begot a Son called *Mathumatus* (*i*); and likewiſe of *Cato Cenſorius*, who begot divers Children of the Daughter of his Client *Salo*, after Eighty eight (*k*): Or how others eſteem of theſe Accidents as of Miracles (*l*), and like unto that concerning *Sarah* (*m*): Or how ſome diſputing of the Marriages betwixt Youth and Age, do utterly condemn the ſame, if not as unlawful, yet as a moſt unſeemly, unequal, unpleaſant, inconvenient, and perilous Match; the one Party deſiring that thing moſt of all, which the other Party (of all things) is leaſt able to perform (*n*), the occaſion of continual Jars, of filthy Adulteries, and ſometimes alſo of cruel and wilful Murders (*o*). Into theſe diſcourſes or diſputes I will not wade; my meaning in this place is to unfold, at what Age by the Laws Eccleſiaſtical of

(*c*) Anto. Gubertus Tract. de Nuptiis, fol. 76. in fin. & 77. in princ. Tiraquel. de legibus Connub. Lege. 5. verſ. Lycurgus.

(*d*) c. quædam. diſtinc. 2. Minſing. lib. 3. Inſt. tit. de Succeſſ. Libert. §. poſtea poſt Alciat. lib. 3. diſpunct. c. 3. & 6.

(*e*) Anto. Gubertus Tract. de Nuptiis, fol. 77. nu. 55. gloſſ. in l. Sancimus cl. 2. C. de Nuptiis, Tiraquel. de legibus Connub. Leg. 5. verſ. Sed & ſi.

(*f*) *Poppea non autem Pompeia, ut eſt in c. quæd. diſtinctio. 2. cujus errorem reprehendit* Alciatus. lib. 3. diſpunct. c. 3. *quem ſequuti ſunt* And. Tiraquel. ubi ſupra. & Minſing. in §. poſtea. Inſtit. de Succeſſ. libert.

(*g*) Anto. Gubert. Tract. de Nuptiis, fol. 78. nu. 58.

(*h*) Trajanus in Claud. c. 23. Anto. Gubert. ubi ſupra. nu. 57.

(*i*) Plin lib. 7. Nat. Hiſt. c. 14. Gubert. Tract. de Nuptiis, fol. 79. nu. 63. Minſing. in §. poſtea Inſtit. de Succeſſ. libert.

(*k*) Gubertus & Minſingerus ubi ſupra ex Plinio, Plutarcho, Solino, & aliis.

(*l*) Tiraquel. de legib. Connub. lege 5. verſic. *quod ſi quiſpiam, &c. pro quo facit Albertus magnus*, lib. 5. de animalibus. Tract. 2. c. 1.

(*m*) Geneſis c. 21. verſ. 2. Epiſtol. ad Hebr. c. xi. v. xi.

(*n*) Tiraquell. de legibus Connub. lege 5. verſ. *Sed & ſecuti: quem velim perlegas.*

(*o*) Tiraquel. ubi ſupra.

this

this Realm, now in force, it is lawful to contract, not Spousals only, but true and perfect Matrimony.

2. Understand therefore, That a Man so soon as he hath accomplished the Age of *Fourteen* years, and a Woman so soon as she hath accomplished the Age of *Twelve* years, may Contract true and lawful and individual Matrimony (*p*), in case there be no other impediment to hinder the same: The Reason is, that because at these years the Man and the Woman are not only presumed to be of discretion (*q*), and able to discern betwixt good and evil, and what is for their profit and disprofit (*r*); but also to have Natural and Corporal Ability to perform the duty of Marriage (*s*), and in that respect are termed *Puberes* (*t*), as it were Plants, now sending forth Buds and Flowers, apparent Testimonies of inward Sap, and immediate Messengers of approaching Fruit (*p*). And albeit this Age may seem over-tender and over-timely to prevent those Inconveniencies so long ago foreseen by *Lycurgus*, *Plato*, and the rest (*x*), yet considering the Lord and Maker of all Creatures, in the beginning of the World, hath by Divine Providence, for the propagation of his Church, proclaimed an universal Liberty *Crescite & Multiplicamini* (*y*). And therefore that this Liberty is to be denied to none, whom otherwise the Almighty hath naturally disposed and enabled to encrease and multiply (*z*); considering also, that like as the little Sparks are to be extinguished at the very first, least afterwards they mount to an unquenchable Flame: So whosoever have any such

(*p*) c. Puberes' c. Attestationes' c. continebatur' de desponſ. impub. L. quæſitum L. in Sponſal. & ibi gloſſ. A. de Sponſal. L. mulierem de ritu nupt. ff. Summa Hoſtienſ. Tit. de desponſ. impub. §. 1. Covar. Tract. de Sponſal. ſecunda parte, c. 5. nu. 2. Panor. in c. Atteſtationes, de desponſ. impub. nu. 7. Lindwood in c. unic. de desponſ. impub. lib. 4. provincial. conſtit. Cant. verb. ætatem.

(*q*) d. c. unic. de desponſ. impub. lib. 4. provincial. conſtit. Cant. verb. tempus diſcretionis.

(*r*) Anto. Gubert. Tract. de Nuptiis, fol. 67. nu. 20. *ubi aſſignat rationem cur adveniente pubertate ſapiant.* (*s*) Covar. Tract. de Sponſal. ſecunda parte, c. 5. nu. 2. Præpoſ. in c. Tuæ. dē desponſ. impub. extra. nu. 2. (*t*) c. Puberes de desponſ. impub. extra, & ibi DD. Spiegel. Lexic. verb pubertas. (*u*) Spiegel. ubi. ſupra. Anto. Gubert. Tract. de Nuptiis, fol. 69. nu. 23. (*x*) de quibus Tiraquel. de legibus Connub. lege 5. verſic. Lycurgus. (*y*) Geneſ. c. 1. verſic. 28. (*z*) Hoſtienſ. Summa. Tit. de Matr. §. ubi. & §. quis, cum Addic. ibidem. Anto. Gubert. Tract. de Nuptiis, fol. 49.

Sparks

Sparks of Natural Provocation, whereby their hearts may be kindled, or ſet on fire by ungodly Luſts. To theſe Perſons, albeit very young, the Remedy againſt Luſt is not to be denied (*a*), eſpecially ſeeing it is *better to marry than to burn* (*b*). Theſe things (I ſay) conſidered, it is a large and clear caſe, That we may not ſo foreſee the avoidance of Temporal Diſcommodities, with *Lycurgus*, or any other Philoſophers, that we overſee greater Dangers by abridging the general Liberty of Generation, eſtabliſhed without diſtinction of years by our *eternal Lycurgus*, and heavenly Law-maker; or by denying or deferring to any that are ſtinged with Carnal Appetite, the bleſſed and Sovereign Remedy againſt this Poiſon, invented by Divine Philoſophy.

(*a*) Epiſt. 1. ad Corinth. c. 7. v. 2. c. quicquid c. ſicut 32. q. 2. Addic. ad Hoſtienſ. ubi ſupra. Melchior Kling. Tract. de Cauſis Matrimonial. fol. 84.

(*b*) Epiſt. ad Cor. c. 2. v. 9. Silva Nuptialis lib. 3. n. 21.

3. But what may be the Reaſon wherefore Women are ſooner ripe than Men?

I will not Anſwer with the Gloſs, *Quia citò creſcit herba mala* (*c*), for this is but a Jeſt. *Macrobius*, (he ſaith) it is *propter votorum feſtinationem* (*d*), for the forwardneſs of their Deſire: Some do yield this Reaſon, *Quia facilius eſt pati quam agere* (*e*); this is ſomething but it is not all: Others, becauſe the Female Bodies are more *tender* and *moiſter* than the *Male* (*f*): And ſo Mens Bodies being harder and drier, they are more ſlow in ripening; and Womens Bodies, becauſe they are ſofter and moiſter, are more quickly ripe; like as it is to be ſeen in Plants and fruits, whereof that which is more ſoft and moiſt is ſooner ripe, than that which is hard and dry (*g*). And this I take to be the *beſt* Reaſon, and is agreeable to that which followeth, namely, That even that Fruit which is ſooner ripe, doth ſooner decay: So

(*c*) gloſſ. in l. 11. C. *de his qui veniam ætatis impetr.*

(*d*) i. e. *propter deſiderium generandi, & pervenientem vim naturalem.* Anto. Gubert. Tract. de Nuptiis, fol. 70. nu. 30. *Seu propter malitiam ſupplentem ætatem.* Ita Covar. Tract. de Sponſal. ſecunda parte, c. 5. nu. 2. Tiraquellus de legibus Connub. leg. 5. verſ. ſed jam nunc.

(*e*) Præpoſ. in c. puberes de deſponſ. impub. per c. Juvenis. de Sponſal. extra. Lindwood in c. unic. de deſponſal. impub. lib. 4. provincial. conſtit. Cant.

(*f*) Theophraſt. lib. 1. plant. Anto. Gubert. Tract. de Nuptiis, fol. 69. n. 25.

(*g*) Anto. Gubert. ubi ſupra poſt Theophraſt. Ariſtot. & alios.

Women

Women as they are ſooner able, ſo they ſooner become unable to bring forth than Men to beget (*h*).

(*h*) Panor. in c. 1. de deſponſ. impub. extra. Tiraquel. de legib. Connub. lege 5. verſ. *nec erit imtempeſtivum.*

4. The former Rule ſtanding upon theſe Reaſons and Foundations agreeable to the Law of God and Nature, is thus extended: Firſt, Albeit he or ſhe have not fully accompliſhed their ſeveral Ages of *Fourteen* and *Twelve* years at the time of the Marriage, the ſame peradventure being Solemnized within *one*, *two*, or *three* days next before the expiration of thoſe ſeveral years, yet is the Marriage of no leſs force than if the laſt hours of thoſe years had alſo been expired (*i*).

5. The ſecond Ampliation is, That albeit he that hath accompliſhed the Age of Fourteen years at the time of the Marriage, be not then *able to pay* the Debt which he oweth to his Wife, yet by the received Opinion (though ſome diſſent) the Matrimony is not therefore by and by to be adjudged void, but ſhe is to expect until he have over-reached the *Eighteenth* year of his Age (*k*), wherein *plena pubertas* is concluded (*l*); and if then alſo he be unable to pay his due, at the inſtance of the Woman the Marriage may be diſſolved (*m*), unleſs the Judge, upon the conſideration of the Qualities of the Perſons, ſhall grant a longer time (*n*).

(*i*) Panor. in c. Atteſtationes. de deſponſ. impub. extra. nu. 7. in fin. *ubi loquitur de uno tantum die.* Henr. Boic. in c. puberes eod. tit. prope fin. *qui loquitur de tribus diebus.* Adde Panor. in c. fin. eod. Tit. nu. 6.

(*k*) Panor. Cardinal. & alii in c. puberes. de deſponſ. impub.

extra. Covar. Tract. de Sponſal. ſecunda parte, c. 5. nu. 2. in fin. (*l*) L. Arrogato ff. de Adep. Spiegel. Lexic. verb. puberſas in fin. Anto. Gubert. Tract. de Nuptiis, fol. 69. *qui tres offert rationes æſtimandi pubertatem plenam xviij. annis.* (*m*) Panor. in d. c. puberes. de deſponſ. impub. (*n*) *Puta unum aut alterum menſem.* Henric. Boic. in c. puberes. de deſponſ. impub. paulò ante fin. Melch. Kling. Tract. de Cauſ. Matr. fol. 32. b.

6. The third Ampliation is, That after the expiration of Fourteen and Twelve years, Men and Women, how old ſoever they be, may lawfully marry, notwithſtanding

ſtanding any Prohibition of former Laws (*o*). And albeit not Women only in proceſs of time become barren and fruitleſs, but Men alſo (if we may believe the Learned) are at length (*viz.* after Eighty years) deprived and ſpoiled of the Ability of getting Children (*p*), in whom, if any heat or warmth be then left, whereby by Nature or by Art they are provoked (*q*), this Act is not of force for Procreation (*r*), which was the cauſe wherefore ſometimes they might not marry (*s*); yet nevertheleſs ſo beneficial are the Laws *Civil* and *Eccleſiaſtical* in theſe days, to them that be diſpoſed to marry, that none are barred by lapſe of any years (*t*), *ut Matrimonium, quod in aliis eſt infirmitatis remedium, in Senibus ſit humanitatis Solatium* (*u*); That Matrimony, which is in others the remedy of Infirmity, may be in the Aged a Solace of Humanity. But I ſpeak this rather to defend the Marriage of the Aged from unlawfulneſs, than to commend it for comlineſs (*x*).

(*o*) L. Sancinus. el. 2. C. de Nuptiis, c. nuptiarum 27. q. 1. in princ. gloſſ. & DD. in c. quod Sedem de frigid. & maleſ. extra.

(*p*) Albertus (*tam re quàm nomine magnus*) lib. 5. de Animal bus. Tract. 2. c. 1. *Cujus verba ſunt hæc, homo maſculus circa xxx. annos habens Semen perfectè maturum, poteſt generare ad lxx. annos, & rarò in valiticribus extenditur hæc virtus uſque ad lxxx. annos.*

(*q*) Melchior Kling. Tract. de cauſ. Matrim. fol. 32. in fin.

(*r*) Albertus magnus, Tiraquel. Socin & Menoch. ubi ſupra.

(*s*) Gloſſ. in L. Sancinus C. de nup.

(*t*) L. Sancinus C. de nuptiis. gloſſ. & DD. in c. quod Sedem de frigid. & maleſ. extra.

(*u*) c. nuptiarum. 27. q. 1 in princ. Anto. Gubert. Tract. de Nup. fol. 80. verb. dubium.

(*x*) conſule Tiraquel. de leg Connub. Leg. 5. & Nevizan. in Silva. Nuptial. lib. 2. nu. 13. &c.

Sed poſt hæc eſt labor & dolor, & nim eſt aliqua virtus generationis, Licet teneat, &c. Tiraquel. de legibus Connub. L. 5. verb nec intempeſtivum Socinus Jun. conſil. 85. nu. 45. vol. 2. Menoch. Tract. de Arb. Jud lib. 2. caſ. 89 nu. 54. &c.

7. The fourth Ampliation is, That albeit the Man and the Woman have not as yet accompliſhed his and her full Age of Fourteen years and Twelve, but *proximi pubertati*, next unto ripe Age, or nearer ripe Age than Infancy; *viz.* he of the Age of Ten years and an half, and ſhe of the Age of Nine years and an half, or upwards, towards his or her ſeveral Ages of Fourteen and Twelve (*y*), if during this time *malitia ſupplet ætatem*, natural Ability to perform the Duty of Marriage (for ſo the

(*y*) Covar. Tract. de Sponſal. ſecunda parte, c. 5. nu. 4. DD. in c. de illis el. 2. de deſponſ. impub.

the word *malitia* ſignifieth in this place, as I have ſhewn in another place (z), ſupply the Age, they may as lawfully marry, as if they had exceeded their ſeveral Ages of Fourteen and twelve years (a); or if thoſe Perſons be yet younger, *viz. proximi infantiæ*, next unto Infancy, or nearer their Infancy than their ripe Age, yet having diſcretion of mind and ability of body to conceive (the effect of Marriage) and to pay the Debt thereunto belonging, the Marriage is lawful and effectual (b). And the Laws of our Realm ſay, That the Wife, which is of the Age of *Nine* years at her Husbands death, ſhall be endowed of the third part of his Lands and Tenements which he held either in Fee-ſimple or Fee-tail, and which he had either by Purchaſe or Diſcent (c). Some go further, and ſay, That if a young Man of ripe Age marry an Infant, and have the uſe of her Body before ſhe be Seven years old, that the Marriage is good (d): But others (whoſe Judgments I do rather follow) do hold, That this Marriage is not good (e); for, ſay that the Infant was known Carnally (which things is no leſs incredible to be ſpoken than horrible to be heard) yet the Infant not having diſcretion to underſtand what is the Nature of Matrimony (f), cannot give her Conſent to that whereof ſhe is ignorant (g), and conſequently the Marriage cannot be good: For it is a clear Caſe, That without Conſent there cannot be any Matrimony (h). And here note, That whenſoever any Perſons are married before their ſeveral Ages of Fourteen or Twelve years, two things are requiſite to the validity and force of Marriage; the one is, Diſcretion to diſcern the the Nature and Force of Marriage; the other is, Natural Abi-

(z) ſupra §. 7.

(a) c. puberes, &c. c. de illis. el. 2. de deſponſ. impub. extra & ibi Panor. Melchior. Kling. de cauſ. matrimonial. fol. 15.

(b) Panor. in c. de illis. el. 2. de deſponſ. impub. nu. 4. Summa Silveſtrin. verb. Matrimo. 5. q. 2. gloſſ. in c. 1. 2. c. q. 1. *Attamen non ſufficit ſola coeundi potentia ſine diſcretione*, Covar. Tract. de Sponſ. 1. ſecunda parte, c. 5. nu. 3. *quem velim videat.*

(c) Fitzherbert Na. Br. fol. 149. Littleton tit. Dower in princ.

(d) Hoſtienſ. in c. puberes de deſponſ impub. per. c. Juvenis. de Sponſal extra. Præpoſ. in d. c. Juvenis. nu. 7. fol. 3.

(e) Panor. in c. continebatur. de deſponſ. impub.

extra. nu. 6. Covar. Tract. de Sponſal. ſecunda parte c. 5. nu. 3. in fine, *qui tamen limitant hoc dictum, nempe niſi illa ſit doli capax, & multum diſcreta; huc accedit*, Summa Sylveſtrin. verb. Matrimonium. 5. q. 2. (f) Covar. ubi ſupra. (g) L. ſi per errorem. ff. de Juriſ. omnium Judic. (h) L. nuptias. de Reg. Jur. ff. c. cum locum. de Sponſ. extra.

lity to pay the Marriage Debt (*i*). This Diſcretion is then preſumed when the Parties be *proximi pubertati* (*k*), that is, nearer ripe Age than Infancy: But that Ability is not then preſumed, nor until the parties have accompliſhed their aforeſaid ſeveral Ages (*l*), unleſs it be *lawfully proved* (*m*).

(*i*) Covar. in Tract. de Sponſal. ſecunda parte, c. 5 nu 3. verſic. ex quibus Panor. in c. de illis. el. 2. de deſponſ. impub. extra. nu. 4.

(*k*) Covar. ubi ſupra.

(*l*) Henr. Boic. in c. puberes, de deſponſ. impub. verſic. unde licet. Præpoſ. in c. de illis el. 2. nu. 1. in fin. Kling. de cauſ. matrim. fol. 15. verſ. quarto loco. (*m*) Henr. & Covar. ubi ſupra. Anto. Gubertus. Tract. de Nuptiis, fol. 76.

8. But how may this Ability to perform the Duties of Marriage be proved (*n*)? or rather peradventure thou demandeſt, Whether it be poſſible for a Child to beget or bear a Child?

Indeed this Queſtion *Whether*, muſt firſt be ſatisfied before that other Queſtion *How*; for thy ſatisfaction therefore, whether it be poſſible, I will deliver what I have received of others. An ancient Father of the Church, of no leſs Learning than Credit, *Jerome* by name, writeth thus (*o*); *Domino teſte non mentior, Quædam muliercula, quum expoſitum nutriret infantem, & inſtillaret Cibos, ac Nutricis officio fungeretur, cubaretque cum eâ parvulus, qui uſque ad decimum jam pervenerat annum, accidit, ut (pluſquam pudicitia patitur) ſe mero ingurgitaret, accenſâque libidine, obſcænis motibus ad Coitum duceret infantem, prima Ebrietas iterata alterius noctis, & cæterarum deinceps, fecit Conſuetudinem, nec dum duæ menſes fuerunt evolutæ, & ecce fœminæ uterus intumuit; Quid plura? providentiâ Dei factum eſt, ut quæ contra naturam ſimplicitate parvuli in contemptum Dei abuteretur, à naturæ Domino proderetur.* The Lord is my Witneſs I do not lye (ſaith *Jerome*) a certain Woman, when ſhe had nouriſhed an

(*n*) de hac. q. Præpoſ. in c. de illis el. 2. & ibi Panor. de deſponſal. impub. extra. gloſſ. & DD. in c. 1. §. 1. de deſponſ. impub. in Sext. Covar. in c. 5. n. 3. Tract. de Sponſ. l. parte 2.

(*o*) Hierom. Epiſt. ad Vitalem. Tiraquel. de legibus Connub. lege. 5. verſic. & de alio. Anto. Gubert. Tract. de Nuptiis, fol. 75. nu. 48.

(*p*) *Expoſiti dicuntur infantes, qui ſine Cura dimittuntur, ut ſolent egeni parentes exponere infantulos & languidos ante Eccleſias, ut alii miſeratione commoti eos colligant, & pietatis intuitu enutriant.* Spiegel. Lex. & DD. in Tit. de Infan. & languid. expoſ. extra.

abject

abject Child, and fed him with Meat, and performed the duty of a Nurſe, with whom alſo the Child did lye till he was Ten years old; it fell out that (more than modeſty will ſuffer) the Woman gorged her ſelf with ſweet Wine, and being inflamed with Luſt, provoked the Child by her unchaſt Motions to commit the Act, the firſt Drunkenneſs being iterated the ſecond Night, cauſed a Cuſtom of the other Nights following. But e're two Months were paſt, behold her Belly began to ſwell. What will ye have more? by the Providence of God it came to paſs, that ſhe that did abuſe the ſimplicity of the Infant, to the Contempt of God, was diſcovered by the Lord of Nature. *Gregory* likewiſe in a certain Dialogue (*q*), doth witneſs of a Boy in his time, which being of the Age of Nine years, begot his Nurſe with Child, whoſe Teſtimony is without exception received for true (*r*). *Albericus* maketh mention of a young Damoſel in his time, who being of the Age of Nine years, brought forth a Child (*s*). *Hoſtienſis* reporteth, That in the Caſtle of S. *Michael*, within the Dioceſs where he dwelt, a Boy of Ten or Eleven years begot a Child (*t*). *Henry Boich* our Countryman, and of all Canoniſts the moſt methodical, telleth us of a Child, which was defloured in his time, when ſhe was but Eight years of Age (*u*). How many years old was *Solomon* when he begot *Rehoboam* of the Daughter of *Pharoah* (*x*)? or *Ahab* when he begot *Ezechiah* of *Abiah*, the Daughter of *Zechariah* (*y*)?

(*q*) *Sed nullus talis* Gregorij *extat Dialogus*, Inquit Gubertus Tract. de Nuptiis, fol. 75. nu. 46. Sed Covar. contra, nempè quod extat lib. 4. dialog. c. 19.

(*r*) Gloſſ. in c. 1. 20. q. 1. Jo. And. Cardinal. & Panor. in c. puberes. de deſponſ. impub. extra. Hoſtienſ. in ſuâ Summâ. Tit. de pœniten. §. Cui pueri. Joſ. in L. in pupillari. ff. de vulg. ſub. nu. 11. Alex. ibidem nu. 6. Tiraquell. de legib. Connub. Leg. 5. verſic. Sed quæ divus Greg. (*s*) Albericus Roſa. in ſuo Indice, Matrimonium 2. (*t*) Hoſtienſ. in c. ult. de eo. qui cogn. conſang. ux. Tiraquel. de legib. Connub. verſic. Sed jam nunc, &c. (*u*) Henr. Boic. in c. puberes, col. 2. de deſponſ. impub. extra. (*x*) Lib. 1. Regum, c. 3. v. 1, 7. (*y*) Lib. 2. Regum, c. 18. v. 1, 2.

By.

By the Teſtimony of ſundry, both Divines (*z*), Canoniſts (*a*), and Civilians (*b*), the Fathers were not paſt Ten or Eleven when they begot theſe Children. The Hiſtories are rich and plentifully furniſhed with ſuch Examples: Therefore it is not a thing impoſſible, That Children ſhould beget and bring forth Children? neither incredible in theſe days, ſince we are ſo much the ſooner ripe, as our Lives are now ſhorter than they were in former Ages.

(*z*) Hierom. Epiſtol. ad Vitalem alias ad Ditamum 75.

(*a*) Hoſtienſ. Summa. Tit. de peniten. verb. cui pueri. Jo. And. in c. ult. de eo qui cog. conſang ux. extra. Covar. Tract. de Sponſal. ſecunda parte, c. 5. nu. 4. ad Bart. in eand. L.

(*b*) Alex. & Jaſ. in L. in pupillari. ff. de vulg. ſub. Addit.

SECT.

SECT. X.

By what Form of Words Spousals de futuro *are contracted.*

1. THat we may understand by what form of words Spousals *de futuro* are contracted, it is needful diligently to observe two Distinctions: The first Distinction is, That of *words* whereby Spousals are contracted: Some are of the present time, as [*I do take thee to my Wife*] and [*I do take thee to my Husband, &c.* (*a*)] and some of the future time, as [*I will take thee to my Wife*] and [*I will take thee to my Husband, &c.* (*b*)].

2. The second Distinction is, That of *words*, some do sound or harp of the *entrance* or *beginning* of Marriages; as to Contract, to Espouse, to Marry, to Take, to Make Wife or Husband, &c. (*c*). And some again do sound of the *end* and *execution* of Marriage, as to Have, to Hold, to Entreat, to Provide for, as Wife and Husband, &c. (*d*). The use of which Distinction is this.

(*a*) c. Si inter de Sponsal. extra. & ibi DD. Lancel. Instit. Jur. Can. Tit de Sponsal. §. 1. Summa Silvestrin. verb. Matrimon. el. 2. q. 9. Henr. Boic. in c. ex parte. de Sponsal. extra.

(*b*) d. c. si inter. & DD. in c. ex parte. de Sponsal. extra Lancel. &

Henr. Boic. ubi supra. Melchior Kling. Tract. de caus. Matrimonial. fol. 1.

(*c*) Panor. in c. ex literis. el. 1. de Sponsal. extra. n. 5. in fin. Præpos. eod. c. n. 6. Summa Silvestr. verb. Matrimo. 2. q. 9. Covar. Tract. de Sponsal. secunda parte c. 4. §. 1.

(*d*) Panor. Præpos. Summa. Silvestrin. & Covar. ubi supra. Melchior Kling. Tract. de caus. Matr. fol. 6. & 7. Spec. lib. 4. Tit. de Sponsal. in princ. Henr. Boic. in c. ex parte. de Sponsal. lib. 1. consil. matr. consil. ibidem 60. Lib. 2. cons. 17. Eman. Soarez. Com. op. Thesaur. verb. Matrimonium, nu. 9. Menoch. de præsumpt. lib. 3. præsumpt. 3.

3. When.

3. When the Parties contracting Spouſals do uſe words of future time, theſe are Spouſals *de futuro*, and not Spouſals *de præſenti* (*e*); in caſe alſo, theſe words do ſound of the *entrance* and *beginning* of Marriage (*f*), otherwiſe the Spouſals are *de præſenti*, like as if they were contracted by words of the preſent time (*g*). For Example; Imagine that the Man ſaith thus to the Woman [*I will marry thee* (*h*)] or [*I will Eſpouſe thee* (*i*)] or [*I will contract Matrimony with thee* (*k*)] or [*I will take thee to my Wife*] or [*I will make thee my Wife, &c.* (*l*).] And that the Woman anſwering, ſaith; And [*I will marry thee*] or [*I will Eſpouſe thee*] or [*I will contract Marriage with thee*] or [*I will take thee to my Husband, &c.*] By theſe, and ſuch like words, Spouſals *de futuro* are contracted (*m*).

(*e*) c. penul. §. verum de Sponſal extra.
(*f*) Panor. & Præpoſ in c. ex literis. el. 1. de Sponſal. extra. alter nu. 5. alter. nu. 6. Summa Silveſtr. verb. Matrimo. 2. q. 9. Menoch. de præſump. lib 3. præſump. 3. nu 2.
(*g*) Panor. & Præpoſ. ubi ſupra. & Sum. Silveſtr. ubi ſupra. lib. 1. conſil matr. conſil. ibidem lx. nu. 16.
(*h*) c. ſicut. c. requiſit. de Sponſal. extra. & ibi DD.
(*i*) Panor. in c. ex literis. el. 1. de Sponſ. extra. nu. 5. Silveſt. ubi ſupra. Card. in c penul. q. 2. & ibi Præpoſ. nu. 4. *Id quod tunc demum procedit ſtante communi loquendi uſu. Ut eſt apud Noſtrates, qui hoc verbum* Eſpouſals *pro Matrimonio ſumunt, ſicut dixerim principio, alias crederem, quod per hæc verba* Sponſabo te, *nec Matrimonium, nec Sponſalia contrahi, niſi dictum ſit* Sponſabo te in uxorem. Cardinal. in c. c. penul. q. 3.
(*k*) Panor. in c. ex literis de Sponſ extra nu. 5. & ibi Præpoſ. nu. 6. verb. quandoque. Covar. Tract. de Sponſal. ſecunda parte, c. 4. §. 1. nu. 4. So arez. Theſaur. com. op. verb. Matrimonium, nu. 91. *quorum opinio communis eſt. Ut eſt videre apud eos, & apud* Vivium. Theſaur. com. op. verb. Matrimonium.
(*l*) c. Si inter. §. 1. de Sponſal. extra. & ibi Panor. Præpoſ. & Card. Kling. Tract. de cauſ. Matrimo. fol. 1.
(*m*) Summa Silveſtr. verb. Matrimo. el. 2. q. 9. DD. in c. ex literis. de Sponſal. extra. Henr. Boic. in c. ex parte. eod. Tit. Covar. ubi ſupra.

4. The reaſon wherefore theſe words import no more but Spouſals *de futuro*, I have before delivered, namely, becauſe like as when a Man doth promiſe that he will ſell and will pay, *&c.* this is no perfect Sale, nor preſent payment, but a promiſe of a future Sale or Payment (*n*): Even ſo whiles the Parties only promiſe that they *will* Marry, will Eſpouſe, will Contract Matrimony, will take or make each other Man and Wife, *&c.* this is no preſent Marriage, no preſent Eſpouſals, no preſent

(*n*) Gloſſ. in l. In venden. C. de contrahend. Emption. Jaſon & alii in l. ſervi Election. ff. de leg. 1. lib. 2. conſil. matr. conſil. ibid. 2. nu. 6.

ſent Contract of Matrimony, no preſent taking or making of Husband and Wife (*o*), nor that preſent Bond or Aſſurance which can never be diſſolved, conſiſting of preſent Conſent, as the only Cauſe and Eſſence thereof (*p*). The reaſon wherefore it is otherwiſe, when the words (albeit of the future time) do ſound of the *end* and *execution* of the Marriage, ſhall then appear, when we ſhall entreat of the Form of Spouſals *de præſenti* (*q*).

(*o*) DD. in c. ex literis. el. 1. de Sponſa. extra. Melchi. or Kling. Tract. de Cauſ. Matrim. fol. 1. Jo. Frigeus. Tract. de Sponſ. in fin. lib. Inſtit. Jur. Civil. fol. 272.

(*p*) L. Nuptias ff. de Reg. Jur. c. ſufficiat 27. q. 2.

(*q*) infra §. 11.

5. Now foraſmuch as there be divers, both Divines (*r*) and Profeſſors of either Law (*s*) which do condemn the difference which is here put betwixt theſe words [*I will*, and *I do*] affirming, That if the Party contracting ſay [*I will take thee to my Wife*] it is in effect as if he had ſaid [*I do take thee to my Wife,*] and ſo importeth Spouſals *de præſenti*, being in truth and ſubſtance indiſſoluble Matrimony. Therefore e're I proceed to the Ampliations and Limitations of the former Concluſion, I think it expedient to examine this Queſtion, Whether there be any ſuch difference betwixt theſe two Phraſes, *viz.* [*I will take thee*] and [*I do take thee*] as is above deſcribed, Yea or No.

(*r*) Mart. in Luther. in libello de cauſ. Matrimon.

(*s*) Schneid. Tract. de Nuptiis, fol. 19. Jo. Frigeus de Sponſal. in fin. lib. Inſtit. Jur. Civil. Heming. Goden. l. 2. conſil. Matr. conſil. ibidem 10. Moral. Tract. de Matrimonio, fol. 30.

6. The firſt Reaſon or Foundation whereupon their Opinion is builded, which held That there is no difference, is this, namely, Becauſe in this Sentence [*Ego volo accipere te in uxorem*] *I will take thee to my Wife*, both the Verbs [*Volo*] and [*Accipere*] are of the Preſent Tenſe (*t*), and not any word of the Future Tenſe; and ſo the Sentence is in effect as if the Party had expreſly ſaid [*I will at this preſent, or from henceforth now take thee for my Wife* (*u*)]. But if any man ſhall expreſly ſay [*I will at preſent, or from henceforth take thee for my*

(*t*) Heming. Goden. lib. 2. conſil. Matrimo. conſil. ibidem 1. n. 4. Schneid. Tract. de Nuptiis, fol. 19. Moral. Tract. de Matrimonio, fol. 30.

(*u*) Goden & Civil. Morald.

Schneidwin, ubi ſupra. Jo. Frigeus de Sponſal. fol. 274. in fin. lib. ſui Inſtitut. Jur. ubi ſupra.

Wife] It is all one as if he ſaid [*I do take thee for my Wife* (*x*),] and conſequently there is no difference whether the Party ſay [*I will take*, or *do take thee*].

(*x*) Præpoſ. in c. ex literis el. 1. n. 4. verb. ſecundo modo. in fin.

7. I will not ſay this kind of reaſoning ſo ſtrictly from Tenſes ſavoureth of a bare *Grammarian*, for I eſteem otherwiſe of the Men, than of naked Grammarians; nor will I enquire wherefore tranſlating theſe words [*I will take*, &c.] into Latin, they chuſe rather to ſay [*Volo accipere*] than [*Accipiam*,] let the beſt advantage be taken to further Matrimony (*y*); nor will I ſtand upon this Point, whether it be all one to ſay thus [*I will now at this preſent*] or [*from henceforth take*,] or thus [*I do take*,] ſay there is not any difference (*z*); nor will I deny the Verb [*Volo*] to be of the Preſent Tenſe; ſay it is ſo (*a*); What is it then that I do deny in the former Reaſon forſooth? That theſe words [*volo accipere*] *I will take*, imports thus much, [*I will now, or from henceforth take*] this I deny: If it be urged, That both the Verbs are of the Preſent Tenſe, therefore [*volo accipere*] is as much as [*I will take now preſently* (*c*),] I deny the Argument: For Verbs of the Preſent Tenſe have not always the force of the Preſent Tenſe, but ſometimes of the Future Tenſe (*d*), no more than Verbs of the Future Tenſe have always the force of the Future Tenſe, but ſometimes of the Preſent Tenſe, as hereafter appeareth. And to this effect is that which *Anto. de Butrio* and *Præpoſitus*, with others, do write of the Verb (*Volo*) in theſe words, *Sciendum eſt ante omnia quod verbum* [*Volo*] *de ſuâ natura ſemper denotat voluntatem, ſed quandoque voluntatem ſuſpenſivam de futuro, quandoque voluntatem diſpoſitivam de præſenti* (*e*): Before all things this muſt be known, that the Verb [*Volo*] doth of its own nature

(*y*) c. fin. de Reg. Jud. c. ex parte de Sponſ. extra. & ibi DD. lib. 1. conſil. matrimonial. conſil. ibidem 52. n. 6.

(*z*) Præpoſ. in c. ex literis el. 1. n. 4. verb. Item niſi.

(*a*) Goden. lib 2. conſil. matrimon. conſil. ibidem 1. n. 4. Schneid. Tract. de Nuptiis, fol. 19.

(*b*) lib. 1. conſil. matr. conſil. ibidem 60. nu. 16. & lib. 2. conſil. ibidem 17. n. 8. Summa Silveſtr. verb. matrimonium, el. 2. q. 9.

(*c*) Lib. 2. conſil. matrim. conſil. ibidem 1. n. 4. Schneid. Tract. de Nuptiis fol. 19. Morald. Tract. de Matrim. fol. 30.

(*d*) c. unic. §. 1. de deſponſ. impub. lib. 6. & ibi Gem. & Phil. Franc. DD. in c. ex literis de Sponſal. extra. el. 1. de deſponſ. extra. nu. 6.

(*e*) Præpoſ. poſt. Anto. de Butr. in c. ex literis

always

always import a Will, but sometimes a Will suspensive of that which is to come, and sometimes a Will disposing of that which is present. The like is said of the Infinitive Mood, of the which it is thus written; *Verbum autem infinitivum nihil perfecte significat, sed secundum alia verba determinabitur ad præsens vel ad futurum* (*f*): The Infinitive Mood signifieth nothing perfectly, but is by the direction of other words determined or referred to that which is present or to come: For Example, a Man saith [*volo vendere*] *I will sell*, notwithstanding that both the Verbs are of the Present Tense, yet have they not any force but of the Future Tense; or as if he had said [*vendam*] *I will sell hereafter* (*g*). If any do not conceive my meaning by this Example to this Man, I put this plain Case: Another Man being indebted unto him xx l. saith unto him [*volo solvere*] *I will pay*; whether is this a Payment of his Debt, yea or no? I know he will say it is not (*h*); and withal Reply, That when the thing cannot be satisfied by Words, or by Will only, but by an Act following, then these words must be understood of that Act which is to come (*i*); but when the Case is such, that it doth not necessarily expect a future Act, but may be then accomplished without any subsequent Act, (as in Contracts of Matrimony, which Matrimony is made perfect by Will or present Consent only) in this Case the words have force of present time (*k*). To this Reply, thus I make this Rejoynder; Albeit that Case of [*volo solvere*] *I will pay*, doth much differ from this Case [*volo accipere te in uxorem*] *I will take thee for my Wife* (*l*); yet in these Cases which are absolutely perfected by Consent alone, and which do meerly depend of the Will of the Speaker, even in these Cases the Verb [*volo*] joyned to the Infinitive Mood, signifying the *beginning*, and not the *end* or *execution* of an Act, hath no more force but of the Future Tense.

(*f*) Summa Silvestr. verb. matrimonium, 2. q. 9. Jas. in L. servi electione, de leg. 1. ff. Panor. in d.c. ex literis, nu. 5.

(*g*) Gloss. in l. In vendentis C. de contrahend. Emption. DD. in L. Servi electione de leg. 1. ff.

(*h*) Lib. 2. consil. matr. consil. ibidem 2. nu. 6.

(*i*) Gloss. in l. In vendentis C. de contrahend. Emp. Bar. in l. Servi electione ff. de leg. 1. Col. fin. Card. in c. ex literis. de Sponsal. extra. op. 3.

(*k*) Cardinal. in c. ex literis. de Sponsal. extra. op. 3.

(*l*) de in l. Cunctos C. de Summa Trin. & in L. Servi electione ff. de leg. 1.

The Truth of which Concluſion may be proved by infinite Teſtimonies (*m*), I will produce but two Witneſſes for all: The firſt an excellent Legiſt and Linguiſt, namely *Alciate*, hath theſe words; *Quoties de Actu tractatur qui à noſtrâ pendet voluntate verbum* [*volo*] *cum Infinitivo adjunctum non diſponit, ſed primum voluntatis motum innuit, veluti cum dico* [*volo eligere talem*] *non ideo eligo, vel cum dico* [*volo adire hæreditatem,*] *non cenſeor adiiſſe; ſic reus qui dicit* [*volo confiteri*] *non cenſetur his verbis confeſſus; ſic cum quis dicit* [*volo relinquere Centum* Titio] *hoc ſolo non videtur reliquiſſe (ut receptior ſe habet Summa) Sic* [*volo Contrahere Matrimonium cum Titiâ*] *non creditur contraxiſſe, & ſiqua ſimilia, non tamen procedit Concluſio, quando verbum Infinitivi habet poſteriorem ſignificationem* (*n*): As oft as that Act is handled which dependeth of our Will, the Verb [*volo*] *I will*] being joyned with an Infinitive Mood, doth not diſpoſe, but ſignifie the firſt motion of Will: As when I ſay [*volo eligere*] *I will chuſe*] I do not therefore chuſe; or when I ſay [*volo adire hæreditatem*] *I will undergo the Executorſhip*] I am not therefore denied to have undertaken it; as alſo when the Defendant, which ſaith [*volo confiteri*] *I will confeſs*] is not by theſe words judged, as having confeſſed; or as when any ſaith, [*volo relinquere Centum* Titio, *&c.*] *I will leave an hundred pound to* John at Style] doth not ſeem by this only to have bequeathed it (as the more received Opinion doth hold); or as when a Man ſaith [*volo contrahere Matrimonium, &c.*] *I will contract Matrimony with* Jannet at Style] he is not thereby thought to have contracted; and ſuch like. Notwithſtanding, this Concluſion doth not proceed when the Verb of the Infinitive Mood hath an after ſignification, that is ſounding of the *end* and *execution*. The ſecond Witneſs is *Panormitan* (the Captain of the Canoniſts) whoſe words are theſe: *Verbum Infinitivum aptum*

(*m*) Bar. Alex. Paul. Joſ. Ripa. & alii. in d. L. Servi elect. Futr. Jo. And. Panor. & Præpoſ. in c. ex literis de Sponſal. extra.

(*n*) Alciat. in d. L. Servi electione.

aptum eſt comprehendere tempus præſens aut futurum, ſecundum verba adjecta; nam de ſe Infinitivum verbum nihil perfectè ſignificat, &c. unde ſi verbo [*volo*] *adjiciatur Infinitivum, denotans Actum non dependentem à ſolâ voluntate proferentis, tunc non inducitur diſpoſitio de præſenti, ſed declaratur diſpoſitio in futurum, veluti ſi dico* [*volo aſcendere arborem*] *ſed ſi verbo* [*volo*] *adjiciatur verbum Infinitivum denotans Actum dependentem à ſolâ voluntate proferente, tunc aut verba denotant principium Actûs, & non inducitur diſpoſitio de præſenti; utpote ſi dicam* [*volo te diſponſare, ſeu tecum contrahere, &c.*] *aut denotant executionem Actûs, & tunc inducitur diſpoſitio de præſenti, &c.* (*o*). A Verb of the Infinitive Mood is apt to comprehend the preſent or future time, according to the words joyned thereunto; for the Infinitive Mood doth ſignifie nothing perfectly of it ſelf, whereupon, if unto the Verb [*Volo, I will*] be joyned an Infinitive Mood, ſignifying an Act, which doth not depend of (or is not accompliſhed by) the ſole Will of him that ſpeaketh, then is not preſent diſpoſition induced, but a future purpoſe declared: As if I ſay, [*I will climb into a Tree*] but if unto the Verb [*volo, I will*] be joyned a Verb of the Infinitive Mood, ſignifying an Act ſolely depending on the Will of the Speaker: Then either the words do import the *beginning* of an Act, and preſent diſpoſition is not induced: As if I ſay [*I will eſpouſe thee*] or [*I will contract with thee*] or elſe they do import the execution of an Act, and then preſent diſpoſition is induced. Theſe two Witneſſes being *omni exceptione majores*, I ſhall not need to uſe any further Teſtimony (*p*), unleſs the Caſe were more doubtful than I conceive it to be, by occaſion of this Grammatical Argument deduced from the Tenſes of the Verb [*volo*] or the Infinitive Mood; wherefore we will now come to their other Argument, and ſee whether it be of any greater force than the former. 8. The

(*o*) Panor. in c. ex literis. el. 1. de Sponſal. extra. nu. 5.

(*p*) L. ubi ff. de probac.

8. The ſecond Argument is drawn from the Simplicity of the Vulgar ſort, who albeit they intend to tye ſuch a Knot as can never be looſed, and make the Contract ſo ſure as it may never de diſſolved; yet ſuch is their unskilfulneſs and ignorance herein, that they cannot frame their words to their minds, nor know whether it be all one to ſay [*I will take thee to my Wife*] or [*I do take thee to my Wife* (*q*)] much leſs do they know the difference betwixt theſe words [*I will marry thee*] and [*I will* have *thee to my Wife*] or betwixt theſe words [*I will* take *thee to my Wife*] and [*I will* hold *thee for my Wife*] or betwixt theſe words [*I will eſpouſe thee*] and [*I will intreat thee as my Wife*] or betwixt theſe words [*I will Contract Matrimony with thee*] and [*I will provide for thee as my Wife*] or betwixt theſe words [*I will make thee my Wife*] and [*thou ſhalt be my Wife*] with an hundred ſuch differences wherein appeareth no diſſimilitude. And therefore, ſince it is the very Conſent of Mind only which maketh Matrimony (*r*), we are to regard not their Words, but their Intents, not the formality of the Phraſe, but the drift of their Determination, not the outward ſound of their Lips, which cannot ſpeak more cunningly, but the inward Harmony or Agreement of their Hearts, which mean uprightly (*s*): Which Concluſion, as it is generally true, and is meant of all Perſons (*t*); ſo eſpecially it is extended to thoſe of the *ruder* ſort (*u*), whoſe Sayings are to be expounded with all favour to the furtherance of Matrimony (*x*), otherwiſe if we ſhall curiouſly deſcant upon every word proceeding from a ſimple Conceit, we cannot but miſs of their meanings, and with our fine and dainty Diſtinctions (which never came within the compaſs of their groſs Underſtandings) incumber the Conſciences of them

(*q*) Goden. lib. 2. conſil. matrim. Conſil. 1. n. 4. lib. 1. conſil. matrim. conſil. 52. nu. 5. Schneid. Tract. de Nuptiis, fol. 19. lib. 1. Conſil. matr. conſil. ibidem 52. nu. 5.

(*r*) L. Nuptias de Reg. Jur. ff. c. ſufficiat 27. q. 2. c. cum apud. de Sponſal. extra.

(*s*) c. ex literis el. 1. de Sponſal. extra. c. ex parte, & eod. tit. & ibi DD. lib. 1. conſil. matrim. conſil. ibidem 52. vol. 1. n. 5. & lib. 2. conſil. 1. n. 3. L. non aliter, §. 1. ff. de leg. 3. L. ſemper in ſtipulationibus. de Reg. Jur. ff. Henr. Boic. in d. c. ex parte, col. 1.

(*t*) L. ſemper in ſtipulationibus. de Reg. Jur. ff.

(*u*) Lib. 1. conſil. matrim. conſil. ibidem 52. vol. 1. n. 5, & lib. 2. conſil. 1. n. 3. L. non aliter. §. 1. ff. de leg. 3.

(*x*) c. ex literis, & c. ex parte, de Sponſal. extra. & ibi DD.

them which be coupled (*y*); whereas in these Contracts of Matrimony, whereupon dependeth the peril of Soul, we are before all things to labour diligently to set their Consciences at liberty (*z*). Lest therefore any Man's Conscience (through ignorance of Terms) might be intangled in the Snares of this subtle and more captious Distinction of [*I will*, and *I do*] with the rest of the Differences more subtle and more captious than this; worthily, and upon just cause (as it seemeth) are the same to be rejected, and this reasonable and conscionable Conclusion received, *Ubi duo intendunt contrahere Sponsalia de præsenti, ibi semper contrahitur Matrimonium, licet verba sonent consensum de futuro tantum* (*a*): Where two intend to Contract Spousals *de præsenti*, there is Matrimony always contracted, although the words import but future Consent only. To which Argument thus I answer.

(*y*) Jo. Frigeus de Sponsal. in fin. lib. Institut. Jur. Civil. fol. 274.

(*z*) Lib. 2. consil. matrim. consil. ibidem 19. nu. 7.

(*a*) Summa Angel. verb. matrimonium 2. n. 13. lib. 1. consil. matr. consil. ibidem 52. n. 3. Henr. Boic. in c. ex parte de Sponsal. extra. col. 1. Summa Hostiens. Tit. de Matrimonio. §. qualiter. col. 7.

9. True it is, we are not to stand upon Terms, but upon truth (*b*), and any words will suffice to Contract Matrimony, so that the meaning do appear (*c*). But herein is the Argument faulty, here is *petitio principij* (*d*), whiles it is presupposed that these Parties did intend to Contract Matrimony, because of the rudeness or simplicity: For how can we *know* a Man's meaning but by his words (*e*)? shall we, if a simple man say one thing, conclude that he did mean another thing? surely this were a very strange and preposterous Collection (*f*): For what are words but the Messengers of mens Minds (*g*)? And wherefore serve Tongues, but to express mens meanings (*h*)? Indeed if this meaning

(*b*) c. ex literis de Sponsal. extra. L. semper in stipulationibus. de Reg. Jur. ff. & ibi Hiero. Franc. in Fin.

(*c*) Henr. Boic. in c. ex parte. de Sponsal. extra. col. 1. Summa Hostiens. Tit. de Matrimonio §. qualiter col. 7. (*d*) *De petitione principii succinctè* Oldendorp. Topic. legal. eod. loco. (*e*) Lib. 2. consil. Matrimonial. consil. ibidem 29. nu. 28. quod velim videas DD. in c. Tua. de Sponsal. extra. Baldus in L. si non Convitij C. de Injuriis. (*f*) L. labeo §. cæterum. de Suppel. leg. ff. Bald. ubi supra. Brœcheus in rub. de Verb. Sign. ff. n. 2. & n. 18. & n. 24. (*g*) Alciat. in Rub. de Verb. Sig. ff. in princ. (*h*) Alciat. & Brœcheus in d. Rub. de Verb. Sig. ille. n. 1. iste. n. 2. & n. 24. Ruckerus, cujus consil. extant in lib. 2. consil. matrimonial. & est consilium ibidem 29. nu. 29. &c.

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of the Parties may appear, namely, That they did *intend* to Contract Matrimony, then although the words import no more but Spousals *de futuro*, the Contract is no less than Matrimony (*i*); but when this meanning doth not appear, then, howsoever the Rude and Vulgar sort do often abuse their terms, and speak improperly, we must be directed by the Text, which saith, *Non aliter à significatione verborum recedi oportet, quam si manifestum sit aliud sensisse proferentem* (*k*): We must not otherwise depart from the signification of words, but in case it be manifest, that the Speaker meant otherwise. And to the same effect is it which *Panormitan* writeth, in these words, *Nota contra Rusticos, qui post perfectum Contractum, dicunt se non concepisse vim verborum, debent eadem verba habere suam vim & proprietatem, secundum Juris Dispositionem, nec excusat contrahentem Juris Ignorantia, unde si alter contrahentium diceret, quod credebat contrahere per illa verba Sponsalia, & non Matrimonium, vel è contra, non est sibi acquiescendum, sed accipientur verba secundum rectum & verum intellectum* (*l*): Note against Rusticks, which after a perfect Contract say, they did not conceive the force of the words; for their words ought to enjoy their force and propriety according to the disposition of Law; neither doth Ignorance of Law excuse the Party contracting; whereupon if the one Party should say that he did intend to contract Spousals, and not Matrimony; or contrariwise (that is to say, Matrimony and not Spousals) it is not to be yielded unto him, but the words shall be taken according to their right and true understanding. Here I might also add that notable saying of noble *Baldus*, of whom for his Universal Knowledge in every thing, it is recorded (to his immortal Commendation) *quod nihil ignoravit*, that he was ignorant of nothing; his words are short, but sharp; *Rusticus debet ire ad Civitatem pro Consilio,*

(*i*) Henr. Boic. in c. per tuas. col. 1. de Sponsal. extra. Card. in c. ex literis eod. Tit. Summa Angel. verb. Matrimonium 2. n. 13.

(*k*) L. non aliter. ff. de leg. 3. Brœcheus in Rub. de Verb. Sig. ff. nu. 25.

(*l*) Panor. in c. ex literis. el. 1. de Sponsal. extra. n. 4. Cave. per d. consil. viz. 52. lib. 1. consil. ma. & consil. 1. vol. 2.

Consilio, sicut ad Sylvam pro lignis, alias non excusatur ignorantiâ Juris (*n*): The Country man ought to repair to the City for Counsel, as to the Wood for Fewel, otherwise he is not excused through Ignorance of Law (*o*). But lest this Answer may seem more sharp than short, I will endeavour to satisfie their rough humour by some milder means than by stiff Authority, yet not betraying the Truth. Know therefore, that these Distinctions betwixt words of the *present* and *future* time, and likewise betwixt words signifying the *beginning* and *execution* of any Act, are so far from the nature and property of Snares and Gynns, whereby to catch or entrap any Man at advantage against his meaning, or to incumber his Conscience with subtilty, that on the contrary, they may well be compared unto the Thred which *Ariadne* gave unto *Theseus*; for as without that Thred he could never have escaped out of that endless Labyrinth, wherein were so many difficult Turnings and intricate Returnings, and Windings to and fro innumerable, and but one only Out-gate; so without Distinctions it is impossible to escape out of the confused Maze of such intricate Questions and infinite Errors, amongst the which there is but one only Truth: By Distinctions we discern the Scent and Foot-steps (as it were) of each Man's purpose and intent, thereby, like Blood-hounds, we are taught to trace and hunt out the very Center of each Man's thought (*p*), so far as it is possible with Human Industry, though the way be never so intricate: By Distinctions are ambiguous Questions resolved, confused Matters separated, Things variable discerned, and dark and obscure Enigma's cleared and made bright (*q*). By Distinctions we apprehend the true meaning, not of Men only, but of God himself, as without the which the true meaning and sense of Scriptures cannot be attained (*r*): Nay more,

(*n*) Bald. in l. Juris ignorantiæ. C. qui admitti. n. 1.

(*o*) Inno. in c. ex literis. el. 1. de Sponf. extra.

(*p*) Alciat. lib. 2. de Verb. Signif. fol. (lib. mei) 49. Mantic. de conjectur. ultim. volunt. lib. 8. Tit. 3. n 9.

(*q*) Alciat. ubi supra. L. apud C. de furtis, & ibi DD.

(*r*) *Distingue tempora & concordabunt Scripturæ*, Bart. Bald. & alii in L. apud C. de furtis.

without Distinctions neither the Law, neither the Gospel, can stand or be defended from Contrariety, I had almost said from Falsity (*s*). Hence it is, that Distinctions are termed (of some) the next Neighbours of Truth (*t*), being skilful and faithful Guides whereby Men escape the Erroneous By-paths of False Opinions, and are, at the least, brought unto the place where Truth is secretly seated (*u*): Wherefore seeing the use of Distinctions is so necessary, as thereby we are directed to the Truth of each Man's meaning, when other Means do fail, how can we with safe Conscience speak against Distinctions, unless we are able to shew this meaning, whereby we discern Mens Consciences and the secret meanings of the Parties, by other more certain means than by a simple Argument, drawn from the simplicity of the Persons contracting: For what a simple Argument, and how unworthy such Patrons is this, The Parties are simple or ignorant Persons which did Contract by these words [*I will take thee*, &c.] *Ergo*, they did intend to Contract *Matrimony*, and not Spousals *de futuro*; what else (in God's Name) is this but *principium petere*, & *ignotum per ignotius probare*?

(*s*) Alciat. de Verb. Sign. lib. 2. fol. 49.
(*t*) Mantic. de Conjectur. ultim. volunt. lib. 8. Tit. 3. n. 9.
(*u*) Alciat. ubi supra. DD. in d. l. apud.

10. There remaineth yet one doubt to be absolved which is this. When the parties do Contract by these words [*I will take thee to my Wife*] and [*I will take thee to my Husband*, &c.] not expressing the time when, is it not all one as if either of them had said [*I do take*], seeing when no day is expressed, the thing promised or Act covenanted is to be done presently (*x*).

(*x*) Olden. Topic. legal. loco à petitione principii, L. In omnibus obligationibus. de Reg. Jur. ff. Instit. de verb. oblig. §. omnis Stipulatio. L. cedere. diem ff. de Verb. Sign.

11. I Answer, the parties are presently bound so far forth as the weak Bond of Spousals *de futuro* can tye

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them (y); but they are not at all tyed with that indiſſoluble knot or Bond of Matrimony, becauſe as yet they have not Contracted Matrimony (z), for each ſeveral Contract doth bring forth a ſeveral Bond or Obligation, whereof it is the Mother (a); So long then as the Mother (that is the Contract) is unbegotten, ſo long the Daughter, (that is the Bond or Obligation) muſt needs be unborn. Theſe things conſidered, I conclude, That it is not all one to ſay [*I will take thee to my Wife*] and [*I do take thee to my Wife*]; And that by the Form of words, [*I will take thee, &c.*] Spouſals *de futuro* and not *de præſenti* are Contracted; which Concluſion notwithſtanding as it is diverſly enlarged, ſo on the contrary it is reſtrained in divers Caſes.

(y) Summa Hoſtienſ. Tit. de Sponſal §. quis ſit effectus. in princ. c. 2. c. ex literis el. 2. de Sponſal. extra & ibi Panor.

(z) Ergo Sublatâ Cauſâ, tollitur effectus. Olden. & Everard. loco à Cauſâ.

(a) *Siquidem cum ex contractu naſci obligationem legimus*, L. 1. de Action. & Oblig. ff. Contract. Obligationis matrem non ineptè dicimus.

12. The Firſt Ampliation is collected out of the Premiſſes, that is to ſay, albeit the parties contracted be rude and ſimple perſons, yet theſe words [*I will take thee, &c.*] import no more but Spouſals *de futuro* (*b*), unleſs it be otherwiſe *proved* that they did intend to Contract Spouſals *de præſenti* (*c*).

(b) Panor. in c. ex literis el. 1. de Sponſal. extra n. 4.

(c) DD. in d. c. ex literis. Cave.

13. The Second Ampliation is, albeit the Parties inſtead of the Verb [*volo, I will*] do uſe the Verb [*promitto*, (*d*) *I promiſe*] or the Verb [*placet* (*e*), *it pleaſeth or liketh me*] or [*contentus ſum* (*f*), *I am content*]; wherefore if the parties reſpectively ſay [*I promiſe to take thee*, or *I am pleaſed to take thee*, or *I am content to take thee*, &c.] theſe words or phraſes import no more than [*Volo accipere te, &c. I will take thee, &c.* (*g*)].

(d) Summa Roſell. verb. Matrimonium el. 3. col. 2 lib. 1. conſil. matr. conſil. ibidem 60. nu. 16.

(e) Panor. in c. ex literis. el. 1. de Sponſal. extra. n. 5. & ibi Præpoſ n. 6. in princ.

(f) Lib. 1. conſil. matrim. Conſil ibidem. 60. nu. 16.

(g) Panor. & Prepoſ. in d. c. ex literis lib. 1. Conſil. matr. conſil. ibid. 60. nu. 16.

14. The Third Ampliation is, that albeit the Parties do confirm the Contract with an Oath, yet the ſame Contract being made by the words aforeſaid, the na-

ture thereof is not altered (*h*). And therefore if the Parties ſay, [*I give thee my Faith and Troth to Marry thee* (*i*), or *I ſwear unto thee to take thee to my Wife*, *&c.*] this is but Spouſals *de futuro* (*k*).

15. The Fourth Ampliation is this, namely when either party doth ſay [*promitto tibi Matrimonium*, *I do promiſe thee Marriage*] for this is no more but Spouſals *de futuro* (*l*); nor is it all one to ſay [*I do promiſe Matrimony*] and [*I do Contract Matrimony*] no more than it is all one to ſay [*I will Marry*] and [*I do Marry* (*m*)].

16. The Fifth Ampliation is when Children are Married together, for then albeit they uſe words of the preſent time, as [*I do take thee*, *&c.*] yet by Interpretation of Law theſe are no more but Spouſals *de futuro* (*n*).

17. The Sixth Ampliation is, when after the ſpeaking of ſuch words as induce Spouſals *de futuro*, the parties do add other words, which otherwiſe of themſelves induce Spouſals *de præſenti*; for Example. The one party ſaith [*I do promiſe that I will Marry thee*, *and I will* hold thee *for my Lawful Wife*], and the other party anſwereth, and [*I promiſe that I will Marry thee*, *and I will* hold thee *for my lawful Husband* (*o*)]. Which words [*and I will* hold thee, *&c.*] being uttered alone, do induce Matrimony (*p*); but here they are reſtrained by the words foregoing (*q*), which are to be regarded as Principal, and the words following, as acceſſary; and ſo in this inſtance they induce no more, but Spouſals

(*h*) c. requiſivit. de Sponſal. extra. Covar. Tract. de Sponſal. prima parte. c. 5. in princ.

(*i*) Lib. 1. Conſil. matrim. Conſil. ibidem. 60. nu. 16.

(*k*) Covar. Tract. de Sponſal. prima parte. c. 5. in princ.

(*l*) Heming. Goden. inter Conſil. Matrimonial. lib. 2. Conſil. ibidem. 2. nu. 6.

(*m*) Eod. conſil.

(*n*) c. unic. §. 1. de deſponſ. impub. lib. ſexti & ibidem Gem. & Franc.

(*o*) Specul. Tit. de Sponſal. in princ. n. 7. Panor. in c. ex parte de Sponſ. extra Summa Roſella. verb. Matrimonium 3. col. 2. Summa Silveſtr. verb. Matrimonium. 2. q. 9. in fin. lib. 1. conſil. Matrimonial. Conſil. ibidem. 83. n. 25.

(*p*) Covar. Tract. de Sponſal. Secunda parte, c. 4. §. 1. n. 4. Panor. in c. veniens el. 2. de Sponſal. extra. n. 3. & in c. ex parte eod. Tit. n. 7. Præpoſ. in c. ex literis el. 1. de Sponſal. extra. nu. 6. in fin.

(*q*) Panor. in c. ex parte deſponſ. extra. n. 7. Arg. l. ultim. §. cui dukia ff. de Tritic. vin. et el. legat. Alex. con. 152. vol. 5. lib. 1. conſil. matrim. conſil. 83. n. 10.

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de futuro (*r*), according to the nature of the former words [*I will Marry thee, &c.*]

(*r*) Specul. in Rub. de Sponſal extra. Summa Roſella. & Summa Silveſtr. ubi ſupra lib. 1. conſil. matrim. conſil. Ibidem. 83. n. 25. Alex. conſil. 152. vol. 5. n. 5. Menoch. de preſump. lib. 3. preſump. 3. n. 4. Rom. ſingul. 338.

18. The Seventh Ampliation is when the parties do uſe theſe or the like words, [*I will take no other Woman to my Wife but thee, and I will take no other Man to my Husband but thee* (*s*)], for it is in effect as if he or ſhe had ſaid [*I will tak thee and no other* (*t*)], howbeit this Ampliation doth not paſs without difficulty, as hereafter more fully ſhall appear (*u*).

(*s*) Alex. conſ. 152. vol. 5. n. 3, & 4. lib. 1. conſil. matrim. Conſil. ibidem. 52. n. 1, 2, 3.

19. The Eighth Ampliation is, that if either Party do not repeat the ſame words, *viz.* the one of them ſaying, [*I will Marry thee*, or *I will take thee to my Wife*, or *I will Contract Matrimony with thee*, *&c.*] The other anſwering [*I am content*, or *I am pleaſed*, *&c.*] hereby are Spouſals *de futuro* Contracted (*x*), as if both parties had uſed the ſelf ſame words.

(*t*) *Siquidem hæc dictio* [niſi] *poſt orationem negativam poſita ponit & affirmat exceptum*, Spiegel. Lexic. verb. niſi. L. 2. §. fin. ff. de Cuſtod. reorum. Jaſ. in L. Actio C. de Tranſac. & Alex. d. conſ. 152 lib. 1. conſil. Matrim. conſil. 52. n. 2. Ripa. Reſp. 71.

20. The Ninth Ampliation is, that albeit the one party uſe no words at all, but ſignifie his or her conſent by ſome Signs, as if the one party ſay [*I do promiſe to Marry thee, and if thou be content to Marry me, then kiſs me*, or *give me thy hand*]; Whereupon the other party kiſſing or giving hand accordingly, Spouſals are thereby Contracted (*y*).

(*u*) Infra.

(*x*) c. ſi inter. de Sponſal. extra. & ibi Panor. & Præpoſ.

21. The Tenth Ampliation is, that Spouſals are ſometimes Contracted without expreſs mention of *future Marriage*, or taking to Husband and Wife, *&c.* *viz.* when the parties mutually uſe theſe words [*I will receive thee for my own* (*z*)].

(*y*) Henr. Boic. in c. Tuæ. de Sponſal. extra. col. 2. lib. 2. conſil. Matrimo. conſil. ibidem. 34. n. 5. Summa Silveſtrin. verb. Matr. 2. n. 8. Summa Angelic. verb. Matrimonium. el. 2. q. 4. in fin.

(*z*) c. pen. de Sponſal. extra. §. verum. dec. conſil. 368. n. 2.

22. Fi-

22. Finally, if a Man, taking a Woman by the hand, do ſay unto her, (*I give thee my Faith that I will take thee to my Wife*] albeit the Woman ſay nothing, yet is the Man bound to Marry her if ſhe will; but the Woman is not to be compelled if ſhe will not (*a*), unleſs it be proved at leaſt by ſome Sign, that the Woman did conſent; as if there were ſome Treatiſe before of Spouſals to be Contracted betwixt them; or if ſhe being required, did willingly give her hand to receive his promiſe (*b*); Where I ſaid that the Man is tyed if the Woman will, albeit ſhe ſaid nothing (*c*), that is true, if ſhe will immediately after the Contract, otherwiſe it is not in her power afterwards.

23. The Firſt Limitation of the former Rule is, when it appeareth that the Parties did intend to Contract *Matrimony*; For albeit the words import no more but Spouſals *de futuro*, of their own Nature; yet by reaſon of the intent and preſent Conſent (which alone is ſufficient) *Matrimony* is thereby Contracted (*d*). This Limitation is very General, the reſt are more ſpecial, and do help to declare this intent and meaning.

24. The Second Limitation is, when the Contract is made by way of *Interrogation* and *Anſwer*, for then the Anſwer being made deliberately by this Word [*volo*] *I will*, doth induce Matrimony (*e*); Albeit the other Verb hath relation to the *beginning*, not the *Execution* of Matrimony; for Example. The Man demanding of the Woman whether ſhe will take him to her Husband, ſhe anſwereth [*I will*]: And the Woman likewiſe demanding whether he will take her to his Wife, he anſwereth [*I will*], in this Caſe Matrimony and not Spouſals is Contracted (*f*).

(*a*) Boer. conſil. 40. n. 22. Summa Roſella. verb. Sponſal. in princ. Summa Angel. Eod n. 19.

(*b*) Summa Roſella. ubi ſupra. Addic. Ad Hoſtienſ. in Tit. de Sponſal. §. quot ſunt. litera (*b*) & Boer. d. conſ. 40. n. 22. Andr. Barb. conſil. 6. vel. 1.

(*c*) Silveſtr. Prier. verb. Sponſalia. in princip.

(*d*) Summa Hoſtienſ. Tit. de Matrimonio. §. qualiter. col. 7. Summa Angel. verb. Matrimonium. el. 2. n. 13. Henr. Boic. in c. ex parte. deſponſ. extra. col. 1. lib 1. conſil. Matrim. conſil. 52. n. 3.

(*e*) Covar. Epitom. de Sponſal. ſecunda parte c. 4. §. 1. n. 4. Part. in l. gerit. ff. de acquir. hæred. DD. in L. Servi electione. ff. de leg. 1.

(*f*) Covar. ubi Supra. Præpoſ. in c. ex literis el. 1. de Sponſal. extra col. 2. Verſ. & cum hac diſt. lib. 2. conſil. matr. conſil. ibidem 1. n. 4. Verſ. quod ſi. ex interrogatioen. Menoch. de Arb. Jud. lib. 2. centur. 5. caſ. 496. n. 31 qui refert hoc procedere facta interrogatione ab ipſis contrahen. ſecus ſi ab altero.

25. The

25. The third Limitation is, when the Contract is made after *Treatiſe* of Matrimony to be had betwixt the Parties (*g*); in which Caſe, by theſe words [*I will marry thee*, or *I will take thee to my Wife*, &c.] Matrimony is induced (*h*).

(*g*) Cardinal in Clem. unic. de Conſang. q. 20. Covar. Epitom. de Sponſal. ſecunda parte c. 4. §. 1. n. 4. vide DD. in l. ſi quis cum aliter. de verb. Oblig. ff. Adde Sanchez. Tract. de Matrimonio lib. 1. Diſp. 18. n. 27. fol. 53.

26. The fourth Limitation is, When as over and above the words, there is an Accumulation of ſome Act joyned therewithal, whereby thoſe Spouſals do paſs into Matrimony (*i*). For Example: The Parties ſaying [*I will Contract Matrimony with thee*, &c.] by and by the Man delivereth to the Woman a Ring, and doth put it on her fourth Finger; hereby the Contract is preſumed Matrimonial (*k*); howbeit this Concluſion is not very ſound (*l*): Wherefore it will be requiſite that thou take the pains to read what I have hereafter written, of Subarration, or Giving and Receiving a Ring (*m*).

(*h*) Cardinal & Covar. ubi ſupra lib. 2. conſil. matr. conſil. ibidem 5. n. 14. in fin. Ripa. in Tit. de Sponſal. & Matrimonio. reſp. 71. n. 1. *Intellige de firmato, non de ſimplici tractatu.* Joſ. & Imol. in L. ſi quis cum aliter de verb. Oblig. ff. & Zaſ. in L. 1. §. *Si quis ſimpliciter, ubi profert exemplum firmati tractatus.* (*i*) Lapus Allegat. 57. (*k*) Lapus de Allegat. 57. (*l*) *Immo ſi Annuli traditio ſequatur verba, ad Sponſalia ſolum apta, tunc Annulus ſolum denotat Sponſalia.* Abb. in c. fin. de Sponſ. impub. n. 7. Pariſ. conſil. 69. n. 49. vol. 4. *niſi præcedat Tractatus de Matrimonio contrahendo.* Pariſ. ibidem Adde Maſcard. Tract. de probat. concl. 1023. (*m*) infra §. 15. *Nota quod tractatus debet eſſe firmatus, aliàs non attenditur, quod obſervavi in Cauſa inter* Pratt *& alium, & ut quodam libro meorum* Annotat. fol. 61. Adde Sanchez. Tract. de Matrimonio, lib. 1. Diſp. 18. n. 27.

27. The fifth Limitation is, When the Parties do uſe this word from *henceforth* (*n*) in the Contract; as [*I will from henceforth take thee*, &c.] for it is in effect as if they had ſaid [*I do take thee*, &c.] inducing preſent Conſent (*o*).

(*n*) Præpoſ. in c. ex literis el. 1. col. 2. verb. *Item niſi ex verbis.*

(*o*) Præpoſ. ubi ſupra. *Idem crederem dicendum, ſi dixerint* [*omnino*] *te in conjugem accipere volo*, &c. Ripa in l. Servi electione ff. de leg. 1. in fin. d. l. Adde Felin. in c. ex parte, el. 1. de offic. Deleg. *quo locitradit amj. ſignificationes hujus dictionis* [*omnino*].

28. The

28. The ſixth Limitation is, When as by *common uſe* of Speech the words induce Matrimony; for the propriety of words ought to give place to the common uſe and acceptation thereof in this matter (*p*): If therefore while the Parties do ſay [*I will marry thee*, or *I will Contract Matrimony with thee*, *&c.*] it be the *uſe and cuſtom* of that place by theſe words to Contract Matrimony (although the words of their own nature induce no more than Spouſals) indiſſoluble Matrimony is thereby contracted (*q*).

(*p*) Cardinal. in c. ex literis. de Sponſal. extra. in. fin. Covar. Tract. de Sponſal. ſecunda parte, c. 4. §. 1. n. 4. Præpoſ. in d. c. ex literis, col. 2. verb. *Item niſi communis.* lib. 2. Conſil. matr. conſil. ibidem 1. n. 2.

(*q*) DD. in d. c. ex literis, & in c. ex parte de Sponſal. extra. Jacob. Leoniſſ. inter conſil. matrimonial. lib. 1. conſil. ibidem 52. *quod omnipo velim te videre.*

29. The ſeventh Limitation is, When it is doubtful whether the words uttered by the Parties import Spouſals *de futuro* or *Matrimony*, being apt and indifferent, by reaſon of the double ſenſe thereof, to ſignifie either the one or the other. In which Caſe, that Senſe is to be received which maketh for *Matrimony* (*r*), unleſs it be in prejudice of a *ſecond Matrimony* undoubted (*s*), or unleſs the former Contract be *clandeſtine* or *ſecret* (*t*); or unleſs theſe doubtful words do follow other words, which, without doubt import no more but Spouſals *de futuro* (*u*).

(*r*) Præpoſ. in c. ex parte, n. 6. in fin. de Sponſal. extra. lib. 1. conſil. matr. conſil. ibidem 52. n. 6. DD. in c. ultim. de Reg. Jud. extra. Menoch. de præſump. lib. 3. præſump. 3. in fin.

(*s*) Inno. in c. illud de præſump. extra. facit deciſ. Tholoſſ. q. 172. Paul. Merenda, inter conſil. matrim. lib. 1. conſil. ibidem 86. n. 35. Menoch. de præſump. lib. 3. præſump. 1. n. 31, 32.

(*t*) Dioniſ. Franciſ. inter conſil. matrim. lib. 1. conſil. ibidem. 49. n. 2. & 3. & conſil. 60. n. 21. Covar. Tract. de Sponſal. ſecunda parte, c. 6. in princ. n. 11. Panor. in c. cum Inhibitio. de clandeſtin. de Sponſal. extra. n. 6. & in c. 2. eod. Tit. in fin. Schneidwin. Tract. de Nuptiis, fol. 24.

(*u*) Galat. inter conſil. matrimonial. lib. 1. conſil. ibidem 83. nu. 23, 24, 25.

30. The eighth Limitation is, When the words do favour of the *Execution* of Marriage, as [*I will have thee for my Wife, &c.* (*x*.)]

(*x*) c. ex parte de Sponſal. extra. & ibi DD.

31. The ninth Limitation is, When the Parties, after they have contracted Spouſals *de futuro*, have Carnal Knowledge together; for thereby the former Contract doth paſs, and is (by interpretation of Law) transferred into Matrimony (*y*).

(*y*) c. is qui fidem. c. veniens. el. 2. de Sponſ. extra. Melch. Kling. Tract. de cauſ. matr. fol. 7. Menoch. de præſump. lib. 3. præſump. 3. *ubi hæc concluſio multifariam & extenditur, & reſtringitur.*

L SECT.

SECT. XI.

By what Form of Words Spousals de præsenti *(being in substance Matrimony) are contracted.*

1. WE must neither forget the two former Distinctions, *viz.* That of words used in contracting Spousals; some are of the *present time*, some of the *future time* (*a*). And Secondly, That some words have relation to the *entrance* or *beginning*, and some to the *end* or *execution* of Marriage (*b*): The Examples whereof are before deliverd: Whereunto it may now, Thirdly be added, That some words have respect neither to the *beginning* nor to the *ending*, nor to any Accident, but to the *Substance* of the Act; as [*I will be thy Husband, &c.* (*d*)]: From which three Distinctions flow three several Conclusions, yet tending to one and the same end: Which are these.

(*a*) supra. §. prox. c. si inter de Sponsal. extra.

(*b*) Panor. Præpos. & alii in c. ex parte, de Sponsal. extra. Specul. in Rub. de Sponsal. in princ. lib. 1. consil. Matrimon. consil. ibidem 60. & lib. 2. consil. 17.

(*c*) supra. §. prox. (*d*) Summa Silvestrin. verb. matrimon. 2. q. 9. Ferret. consil. 383. n. 10. lib. 1. consil. matrimonial. consil. ibidem 84. n. 25. DD. in L. Servi electione ff. de leg. 1. & ibi Rip. n. 18. Menoch. de præsump. lib. 3. præsump. 3. n. 5.

2. The first Conclusion is, That when the Parties do Contract Spousals by words of *present time*; as, [*I take thee to my Wife* (*e*)] or [*I hold thee for my Wife* (*f*)] or [*thou art my Wife* (*g*)] or [*I consent unto thee, as my*

(*e*) c. pen. de Sponsal. extra. Menoch. Tract. de præsump. lib. 3. præsump. 3. n. 1. in c. venias. el. 2. de Sponsal. extra.

(*f*) Summa Angel. verb. matrimon. 2. n. 13. Abbas. (*g*) Melchior Kling. Tract. de causis matrimo. fol. 6.

Wife

Wife (*b*)] or [*I commend thee for my Wife* (*i*)]. By these kind of words (being uttered by either Party) are contracted Spousals *de præsenti* (*k*); which kind of Spousals (as I have often foretold) are in Truth and Substance very Matrimony indissoluble (*l*).

(*b*) Specul. lib. 4. in Rub. de Sponsal. in princ. n. 6.
(*i*) Specul. ubi supra.
(*k*) vide DD. in c. ex literis el. 1. & in c. ex parte. & in c. si inter. de Sponsa. extra. Menoch. Tract de præsump. lib. 3 præsump. 3. (*l*) supra. §. 4. c. conjux. c. cum initiat. 27. q. 2. c. si inter de Sponsa. extra. & ibi DD. lib. 2. consil. matr. consil. ibidem 24. n. 2. Melchior. Kling. Tract. de caus. Matrimonial. fol. 7. in fin. Panor. & Felin. in Rub. de Sponsal. extra.

3. The second Conclusion is, That when the Parties contracting Spousals, do use such words of the *future time*, as have relation to the *end* or *execution* of Marriage; as [*I will have thee for my Wife* (*m*)] or [*I will hold thee for my Wife* (*n*)] or [*I will entreat thee as my Wife* (*o*)] or [*I will provide for thee as my Wife* (*p*)] or [*I will keep my Faith unto thee as my Wife* (*q*)]: hereby (like as by words of the present time) are Spousals *de præsenti* contracted (*r*); which Conclusion is (albeit rejected of some) commonly received of the ancient Writers (*t*), whose strongest Reason is, because, *Qui vult consequens, velle videtur & antecedens*, he which granteth the Consequent, or that which followeth, is thought also to grant the Antecedent, or that which goeth before (*u*): For how can he truly *have* or *hold* her as his Wife, which is not first his Wife (*x*), no

(*m*) c. ex parte de Sponsal. extra. & ibi Panor. Boic. & Præpos. cum aliis.
(*n*) Inno. in d. c. ex parte. Menoch. de præsump. lib. 3. præsump. 3. n. 3. Præpos. in c. ex literis. el. 1. de Sponsal. extra. n. 6. Specul. in Rub. de Sponsa. n. 6. Summa Silvestrin. verb. matrimo. 2. n. 9

(*o*) Præpos. in d. c. ex literis, n. 6. Melchior. Kling. Tract. de Caus. Matrimonial. fol. 6. (*p*) Hostiens. in c. ex parte de Sponsal. extra. Specul. lib. 4. in Rub. de Sponsal. n. 6. Melchior Kling. ubi supra. Summa Angel. verb. Matrimonium 2. n. 9. (*q*) Panor. in d. c. ex parte, n. 2. & 3. & ibi Præpos. Specul. & Kling. ubi supra. (*r*) DD. in c. ex literis. & in c. ex parte. de Sponsa. extra. Menoch. de præsump. lib. 3. præsump. 3. (*t*) Mag. Sent. 4. Sentent. Distinct. 28. c. 2. de matr. Hadr. q. 13. Covar. Tract. de Sponsal. secunda parte, c. 1. §. 1. n. 5. Molin. in Addit. ad Dec. in c. juravit de probat. extra. Alciat. in l. Actiones. C. de transact. n. 28. (*u*) Jo. And. Cardinal. Floren. Panor. & Præpos. in c. ex literis. el. 1. de Sponsa. extra. August. Berojus. q. 6. Emanuel Soarez. lib. recep. sentent. verb. matrim. n. 91. Vivius Thesaur. com. op. verb. matrimonium. *in fin. quorum opinionem communiter receptam fatetur.* Covar. Tract. de Sponsa. secunda parte, c. 4. §. 1. n. 5. *ut ipse ab eadem recedat.* (*x*) Panor. in d. c. ex parte. n. 3. Præpos. in d. c. ex literis. n. 6. (*x*) Panor. in d. c. ex literis. n. 5. in fin.

more than a Man can have or hold Tenements or Hereditaments by any Deed, unleſs there be a *Concedimus* before the *Habendum*: Or how can he properly intreat her as his Wife, or provide for her as his Wife, or keep his Faith unto her as his Wife, which is not his Wife before (*y*)? no more than it is poſſible that there ſhould be any *Effect* without the *Cauſe* foregoing (*z*): Wherefore like as by confeſſing the Effect we grant the Cauſe; ſo by promiſing the *end*, we are preſuppoſed to have already promiſed the *beginning*, and conſequently by the promiſe of having, holding, intreating, and providing for, and keeping of Faith, &c. which words reſpect the *end* and *execution* of Marriage, we are now deemed to have turned over the Leaf, and to be paſt the firſt Leſſon, I mean the Promiſe of Taking, Contracting, Eſpouſing, or Marrying, which words do favour only of the *beginning* or *entrance* into Matrimony (*a*).

(*y*) Præpoſ. in d. c. ex literis. n. 6. in fin.
(*z*) Oldendorp. Topic. legal. loco à Cauſâ. Tiraquel. in regul. Ceſſante Cauſâ.

(*a*) DD. in c. ex literis. & c. ex parte, de Sponſal. extra.

4. Others nevertheleſs, as well Divines (*b*) as Lawyers (*c*), Men without all controverſie, excellently learned, and of ſharp Judgments, are of another Opinion, contending earneſtly, That by theſe words, [*I will have thee*] or [*I will hold thee for my Wife*, &c.] Spouſals only *de futuro* are contracted; affirming, that as by words of preſent time Spouſals *de præſenti*, ſo by words of future time Spouſals *de futuro* are contracted, without any ſuch Diſtinction as is above recited, of the *beginning* or *execution* of the Act; and that Spouſals *de præſenti* are not contracted by any other words than ſuch as do clearly, neceſſarily, and ſeriouſly infer and conclude preſent and perfect Conſent (*d*).

(*b*) Magiſtr. in 4. Senten. Diſtinct. 28. c. 2. de matrim. Hadria.....
(*c*) Covar. Tract. de Sponſal. parte ſecunda, c. 4. §. 1. n. 5. Molin. in addit. ad Dec. in. c. Juravit de probat. extra. Alciat. in L. Actione C. de Tranſact. nu. 28.
(*d*) Magiſtr. Covar. & Molin. ubi ſupra.

5. And here (by the way) we may note the contrariety and extremity of Opinions amongſt the Learned, for

for ſome make no difference at all betwixt words of *preſent* and *future time* (*e*), eſteeming that it is all one in effect to ſay [*I will take thee to my Wife*] and [*I do take thee to my Wife*] as appeareth in the former Paragraph (*f*): But now theſe Men are ſo far from confounding the Natures or Effects of thoſe Terms [*I will take*] and [*I do take, &c.*] that on the contrary, they will not at any hand admit words of the *future time* to have the force of *preſent time*, or to induce Spouſals *de præſenti*, albeit the ſame words have reſpect to the *end* or *execution* of the Act (*g*).

(*e*) Martin. Luther. Libell. de cauſ. matrimon. Schneidwin. Tract. de Nuptiis, fol. 19. Jo. Frigeus de Sponſal. in fin. lib. Inſtitut. Jur. Civil. Heming. Goden. lib. 2. Conſil. matrimonial. Conſil. ibid. 1.

(*f*) ſupra. §. proxim. (*g*) Alciatus Covar. & Molin. cum Lombard. & Hadria. ubi ſupra.

6. The former of theſe two Opinions, how erroneous it is, and how unworthy the Patronage of ſuch Learned Writers, is already diſcourſed (*h*). And here by order I ſhall detect the Error of this Opinion likewiſe, which thing I would gladly perform, becauſe it ſeemeth to be new and ſingular, and to oppugn the ancient and received Opinion (*i*). Nevertheleſs, the further I enter into the Conſideration of the Controverſie, the further I am from the Accompliſhment of my purpoſe, the aged Walls and Fortreſſes, that is to ſay, the Reaſons and Arguments wherewith this ancient Opinion is defended ſeeming more weak and feeble, ſo that they are unable to reſiſt the force and freſh Aſſault of the Adverſary, at leaſt in every point of Law: For firſt and principally this Axiom, *Qui vult conſequens velle cenſetur antecedens* (*k*), being the ſtrongeſt place of Defence, and the very Gates of the Caſtle, wherein is placed the greateſt Force, for the Maintenance of the former Opinion, is by virtue of a ſtrong Diſtinction (as by the might of ſome Martial Engin) in danger to be violently burſt open and captivated by the Adverſary, armed

(*h*) ſupra. §. prox. (*i*) *Communem DD. opinionem, & Conſulendo & Judicando attendendam & ampleſtendam ſore permultis fretus teſtimoniis confirmat* Anto. Coratius. Tract. de Communi opinione, lib. 2. Inſpectione 2. (*k*) *De argumento à conſequenti Conſulas velim.* Jo. Oldendorpii Topic. legal. fol. (lib. mei) 126. & Nic. Hol. Everard. loco à conceſſione conſequentis.

armed with this ſharp Sentence; *Ego autem tunc præſentem conſenſum Conjugio præſtitum eſſe opinor, quando ex verbis prolatis, Conſenſus is de præſenti neceſſariò ſequitur; At in hâc queſtione, is Conſenſus non ſequitur neceſſariò, igitur Matrimonium non eſt, &c. nec obſtat illa ratio, Qui enim vult id quod ſequitur, Cenſetur omnino velle id quod permittitur neceſſariò illo tempore, quo conſequens executioni tradendum eſt, unde qui habet aliquam fœminam in uxorem, actu promittit ſe cum illa Matrimonium contraxiſſe, non ſic ille qui præſenti tempore actu non habet, ſed habere promittit in futuro, &c.* (*l*). I am verily of Opinion (*ſaith he*) that preſent Conſent for Marriage is then performed, when as that preſent Conſent doth neceſſarily follow of the words ſpoken: But in this Queſtion, That Conſent doth not neceſſarily follow, therefore it is not Matrimony, nor doth that aforeſaid Reaſon withſtand; for he which granteth that which followeth, is preſumed, at the utmoſt, to grant that which is neceſſarily preſuppoſed at that inſtant wherein the Conſequent is to be put in Execution; whereupon he which indeed hath any Woman to his Wife, promiſeth that he hath contracted Matrimony with her; but ſo doth not he which actually at this preſent hath not a Wife, but promiſeth that he will have hereafter, *&c.* By force of which Diſtinction, the Gates of the former Axiom ſhew as if they were cleft aſunder, and ſet wide open, ſo that we may perceive and underſtand, That an Antecedent is only then preſuppoſed, when the Conſequent is actually executed (*m*), but not before; like as the Cauſe is then juſtly preſumed, when as the Effect is indeed really extant, and not before (*n*); and therefore whiles any man ſaith, [*Habebo te in Uxorem, I will have thee to my Wife*] (ſeeing the Promiſe is not yet executed, but is to be performed hereafter) he is not yet preſumed to have taken her

(*l*) Covar. Tract. de Sponſal. & matr. ſecunda parte. c. 4. §. 1. n. 5. verſic. Ego autem. & verſic. nec obſtat.

(*m*) Covar. ubi ſupra.

(*n*) *Siquidem effectus abſolutam conſummationem ſeu rei perfectionem ſignificat.* Jo. Olden. Topic. legal. loco. ab effectu.

her to his Wife, or to have contracted Matrimony with her in the mean time (*o*). And hereby alſo appeareth the Anſwer to the Queſtions formerly demanded, *viz.* How can he have or hold her as his Wife, which is not firſt his Wife? &c. Whereunto it may be eaſily anſwered; That to *have*, and to *hold*, and to promiſe to have, and to hold, is not all one (*p*): For ſay, that ſhe cannot truly and properly be had, held, entreated, kept, or provided for as Wife, which is not firſt his Wife, of whom ſhe is ſo had, held, entreated, kept or provided for (*q*); yet verily a Man may promiſe that he will have her to his Wife, which as yet is not his Wife (*r*): And although when a Man promiſeth that he will have her, be preſently bound (*s*), yet is it fully anſwered by *Covarruvias*, *Quamvis ſic promittens ſtatim teneatur illam habere in uxorem, dum tamen non habet, Matrimonium non eſt* (*t*). Although he which ſo promiſeth be forthwith bound to have her for his Wife, yet whiles he hath her not, it is not Matrimony. As for the Chapter *Ex parte* (*u*), which divers do urge in confirmation of the common Opinion, it is retorted upon their own pates; for in the Caſe propoſed in that Chapter it is plain, that the Man did promiſe *quòd eam ab eo tempore pro Conjuge teneret* (*x*), That from that time he would hold her for his Wife; which words [*ab eo tempore*] from that time do imply preſent Conſent, and conſequently induce Matrimony (*y*), albeit the words otherwiſe import no more but Spouſals *de futuro* (*z*).

(*o*) Covar. ubi ſupra. Hadr. in 4. Senten. q 13.

(*p*) Covar. ubi ſupra. & Molin. in addit. ad Dec. in c. juravit. de probat. extra. *qui reſpondet, quod in his verbis* [habebo te in ux.] *ſubeſt Conditio, caſu quo in futurum velim uxorem ducere; Item aliud eſt contrahere, aliud velle contrahere.* lib. 1. Cauſ. matrimonial. conſil. ibidem 86. n. 17.

(*q*) Panor. & alii. in c. ex literis. el. 1. & c. ex parte. de Sponſal. extra.

(*r*) Covar. Hadrian. & Molin. ubi ſupra.

(*s*) Panor. in d. c. ex parte. de Sponſal. extra. n. 2. & ibi Cardinal. q. 1.

(*t*) Covar. Tract. de Sponſal. ſecunda parte, c. 4. §. 1. n. 5. verſi Item quamvis.

(*u*) c. ex parte de Sponſal. extra.

(*x*) Text. in d. c. ex parte.

(*y*) Molin. in addit. ad Dec. in c. Juravit. de probat. extra. Covar. de Sponſal. parte ſecunda, c. 4. §. 1. n. 5. verſic. ex quo ab Text. &c. *Imo vero Martinus ita, quod nec per iſta verba* (ab hoc tempore tenebo te pro Conjuge) *contrahitur Matrimonium, niſi partes hoc intendunt, de quo intentione* (inquit) *conſtare poteſt per ſubſequentem cohabitationem, quæ ſequuta fuit in caſu d. c. ex parte, quo facto Ille reliquit eam, &c.* Vide Martin. in Addit. ad Hoſtienſ. Summam. Tit. de Sponſal. §. quot ſunt ſpecies, litera 6.

(*z*) Præpoſ. in c. ex literis. el. 1. de Sponſal. extra. n. 4. verb. *Item niſi ex verbis.*

And

And therefore if the Man ſay [*I will from henceforth take thee to my Wife,*] which words [*I will take thee to to my Wife*] induce no more but Spouſals *de futuro*; but by force of this word [*from henceforth*] preſent Matrimony is induced; like as if he had ſaid [*I do take thee for my Wife* (*a*).] And ſo the Chapter *Ex parte*, is not of any ſuch importance, as many do ſurmiſe. Thus we may behold how the Foundations of that ancient Opinion are battered, the Gates opened, and the Adverſary entred; and that the ſame which heretofore ſo long triumphed in Peace, and hath been ſo highly advanced, and of ſo many honoured for the Truth, is now at laſt ſtrongly beſieged, hotly purſued, greatly diſtreſſed, and in danger to be captivated and condemned, as Falſe and Erroneous, (and if I ſhall not diſſemble) were it not that the Caſtle is better furniſhed with Men than Munition, I mean, if the Patrons and Favourers of this ancient Opinion, were not in number almoſt Infinite (*b*), and their Power and Authority far more terrible (*c*), than their Reaſons or Arguments ſtrong or forcible, I ſhould conjecture, That this ſingular Opinion would quickly prevail and reign as Conqueror; but becauſe they be ſo many in number, and in Authority ſo mighty, becauſe alſo it is not abſolutely lawful for the Judge to pronounce Sentence, nor for the Advocate to give Counſel, againſt the common and received Opinion (*d*), eſpecially when it tendeth to the

(*a*) Præpoſ. ubi ſupra. Vide Inno. in c. ex parte de Sponſ. extra.

(*b*) Cardinal. Zabarel. Hoſtienſ. Anto. de Butr. Panor. Præpoſ. Henr. Boic. & alii. DD. in c. ex parte de Sponſal. extra. Summa Angel. Summa Roſel. & Summa Silveſtrin. verb. matrim. Melchior. Kling. Tract. de Cauſis matrimonial. fol. 7. Menoch. de præſump. lib. 3. præſump. 3. n. 3. Dec. in c. Juravit. de probat. extra. Anto. Galat. lib. 1. conſil. matr. conſil. ibidem 83. n. 23. in fin. lib. 2. conſil. 2. n. 5. Alex. conſil. 153. vol. 2. Boer. conſil. 40. n. 54. Baptiſta Villalob. Theſaur. com. op. verb. matrimonium, n. 36. Vivius eod. lib. verb. matr. in fin. Soarez. eod. lib. verb. matrimon. n. 90. Berous. q. 6. n. 1. Jaſ. in L. Servi. Electione ff. de leg. 1. n. 50. Rip. ibidem n. 18.

(*c*) *De authoritate communis opinionis.* Coraſ. & Macagnanus in ſuis Tract. de com. op. alter. lib. 2. Inſpect. 2. alter. lib. 3. c. 6. & 7.

(*d*) Coraſius Tract. de com. op. lib. 2. Tit. 8. Inſpect. 2. & tit. 9. in princip. cum caſ. ſequen. Macagn. Tract. de com. op. c. 7. in princ.

Con-

Confirmation of Matrimony (*e*); for *Tutius eſt pro Matrimonio quam contra Matrimonium pronunciare* (*f*), it is more ſafe to Judge for Matrimony than againſt Matrimony; and leſs peril to joyn them which be free, than to ſeparate them which be bound (*g*); the victory is like to reſt doubtful. And therefore in the mean time, it were not far amiſs to be unſuſpected, ſaving that the ſtate of this Queſtion being plainly diſcovered and brought almoſt to an Iſſue, ſome do perhaps expect that I ſhould give my Verdict therein, then, of how ſmall moment it is, I eaſily grant in a matter of ſo great moment; but yet to ſatisfie my Readers requeſt, and rather than I will be thought a Neuter, this is my preſent Reſolution.

(*e*) c. ultim. de Reg. Jud. extra. & ibi Panor. & alij. *Immò favore Matrimonij judicand. eſt contra com.* Hoſtienſ. in c. 2. & ibi Panor. & alij de Cogna. Spiritual. extra. Conſet. in ſuis ſingular. verb. opinio. *Sed iſtud an ſit verum videre eſt apud* Coraſium Tract. de com. op. lib. 3. caſ. 20. *erudite de hac re differentem* 2. de Cogna. Spirituali.

(*f*) c. licet ex quadam in fin. de teſtibus extra. & ibidem extra. n. 3. Coraſ. lib. 4. miſcell. c. 4. in fin. teſtibus extra. in fin. c. habetur c. ſcripſit. 27. q. 1.

Panor. & in c. (*g*) c. Licet. de te-

7. That howſoever the ſingular Opinion doth ſeem more probable or more ſuſtentable in the very point of Law, in reſpect of the laſt, in regard of [*habebit*] which muſt be referred to the future tenſe only; yet conſidering the phraſe of our *native Language*, which doth admit no equivocation herein; therefore I do conclude, when the parties do Contract themſelves by ſuch words as may be referred, not only to the *future*, but to the *preſent* time, as [*I will have thee, &c.*] which alſo have relation to the *end* and *execution* of Marriage; This is Matrimony (*h*): For although [*habebo, tenebo, tractabo, &c.* which is, *I will have, I will hold, I will entreat, &c.*] be referred to the *future* time; Yet [*volo habere, volo tenere, volo tractare, &c.* which is likewiſe, *I will have, I will hold, I will entreat*, is referred to the time preſent; And although theſe words [*I will have thee to my Wife, &c.*] being referred to the fu-

(*h*) Panor. & omnes Canoniſtæ in c. ex parte. de Sponſal. extra.

ture time (as if the party had ſaid [*habebo*]) it is a queſtion whether they induce Matrimony or Spouſals; Yet being referred to the time preſent, As if the party had ſaid (*volo habere*) it is no queſtion, for ought that I have read, but theſe words [*volo habere te in uxorem*] induce Matrimony (*i*): Now then ſeeing whiles any Man ſaith [*I will have thee to my Wife*] and [*I will have thee to my Husband*] it may be underſtood [*I will now preſently have*] aſwell as [*I will have hereafter* (*k*)]; in this Caſe that Senſe is to be embraced, whereby *Matrimony* is advanced (*l*).

(*i*) Panor. Præpoſ. & omnes DD. in c. ex literis el. 1. & c. ex parte de Sponſal. extra. (*k*) Lib. 2. conſil. matr. conſil ibidem. 1. n. 4. (*l*) Anto. de Butr. & DD. in c. 1. ex parte de Sponſal. extra. Menoch. de præſump. lib. 3. præſump. 3. n. 9. (*m*) lib. 1. conſil. matr. conſil. ibidem. 83. n. 25. Silveſt. Prier. verb. matrim. §. 2. n. 9. Ripa in L. Servi Electione. ff. de leg. 1. nu. 18. Ferret. conſil. 383. n. 10. (*n*) Menoch. tract. de præſump. lib. 3.

8. The Third Concluſion is all one in effect with the ſecond, namely, that when the parties ſhall Contract themſelves, by ſuch words, as do reſpect not any *Accident*, but the *Subſtance* of the Act. As [*I will be thy Husband*], and [*I will be thy Wife*, &c.] hereby (even as by words which have relation to the *Execution* of the Act) Spouſals *de præſenti* are contracted (*m*).

9. Out of theſe three Concluſions I collect this general rule, That when the parties do Contract Spouſals by words of *preſent time*, or by words of the *future time*, having relation to the *Execution* or *Subſtance* of Matrimony, hereby are Spouſals *de præſenti* Contracted (*n*).

præſump. 3. Panor. & alij in c. ex parte de Sponſal. extra.

10. The Ampliations and limitations of which rule are theſe: The firſt Ampliation is, that Albeit the words be ambiguous, ſuch as of their own nature inforce neither Matrimony nor Spouſals, but by common uſe of Speech induce Matrimony, by theſe words true and perfect Matrimony is Contracted, aſwell as if the words were naturally and properly Matrimonial (*o*). For example; the parties Contracting uſe theſe words, [*I will have thee for my Wife until the Earth cover mine Eyes*] for

(*o*) c. ex literis el. 1. de Sponſal. extra. & ibi Cardinal. Jo. And. ibidem. Præpoſ. in d. c. ex parte n. 7. in fin. per. c. fin. de jud. extra.

for by theſe words (*p*), [*until the Earth cover mine Eyes*] is commonly underſtood until I be dead and buryed; and not until the Earth cover mine Eyes, whiles I am yet alive (*q*): So it is if the Parties ſay [*I will not change thee for a better* (*r*)], or thus, [*none ſhall ſeparate us but death* (*s*)], or thus, [*I will retain thee perpetually with me* (*t*)], or thus, [*here I take thee for mine own* (*u*)], with a thouſand like inſtances, wherein the obſcurity or ambiguity of the Speech hindreth not, but that the common and uſual acceptation thereof, doth inforce Matrimony (*x*); neither is it material whether the Man or the Woman ſpeak firſt (*y*).

(*p*) Panor. in d. c. ex literis n. 5. Covar. Tract. de Sponſ. 2. parte c. 4. §. 1. n. 13. Præpoſ. in d. c. ex literis n. 4. verb. tertio modo. (*q*) Panor. Præpoſ. & Covar. ubi ſupra. (*r*) Hoſtienſ. in c. fin. de ſen. & Re. Jud. extra. Silveſtr. Prier. verb. matrimonium. 2. n. 10. verb. Quintum Melchior Kling. Tract. de cauſ. Matrimon. fol. 6. Præpoſ. in c. ex parte de Sponſal. extra. n. 8. (*s*) Melchior Kling. Tract. de cauſ. Matrimonial. fol. 6. Moraldus tract. de Matrimonio. fol. 29. verſic. Sponſalia verò de præſenti. (*t*) Gloſs in c. Solet. 32. q. 2. Silveſtr. Prier. verb. Matrimonium. 2. n. 10. verb. ſextum. lib. 2. conſil. matrimon. Conſil. ibidem. 34. n. 3. (*u*) Panor. in c. Si inter. de Sponſal. extra. in fin. & ibi Præpoſ. n. 2, & 3. (*x*) Vide DD. in c. ex literis. el. 1. c. ex parte. & in c. pen. de Sponſal. extra. & Specul. in Tit. de Sponſal. & Matrimonio. (*y*) Covar. Tract. de Sponſal. 2. parte. c. 4. n. 6. *dicit tamen honeſtum eſſe ut fœmina prius interrogetur. Poteſt enim (inquit) contingere, quòd fœmina requiſita à viro ut eum acciperet maritum, reſponderet, Accipe tu me prius in uxorem, & tunc demum Ego te accipiam in virum; Ac cum vir eam expreſſe uxorem accepiſſet, poſſet ipſa fœmina illum irridere, ac libere refragari.*

11. Secondly, albeit the words of the Contract properly, or of their own nature induce Sponſals *de futuro*, as [*I will take thee for my Wife, &c.*] Yet if by the Common uſe of Speech or Cuſtom of the place where the Parties do dwell, and were Contracted, they infer Matrimony; This being proved, the Contract is of that force, That, if either party ſhould afterwards Solemnize Matrimony with ſome other perſon, yet that ſecond Matrimony is unlawful, although it were confirmed by carnal knowledge, and procreation of Children (*z*).

(*z*) lib. 1. conſil. matrim. Conſil. ibidem. 52. n. 3. verſ. Sed dubitatur. & n. 9. verſ. Satis evidenter. lib. 2. conſil. Matr. ibidem. 17. n. 19.

12. Thirdly, when as the words of the Contract are partly doubtful, and partly undoubted; As [*I will not*

Marry any other Woman to my Wife, and *I do take thee for my Wife*, &c.] howſoever theſe words of the Contract [*I will not Marry any other Woman to my Wife*] be doubtful and obſcure, inducing rather Spouſals than Matrimony (*a*); Nevertheleſs, foraſmuch as the words following are certain, and do undoubtedly import Matrimony; In this Caſe, the ambiguous words precedent are interpreted by the plain and certain words following, and ſo conſequently the parties are in this inſtance adjudged to Contract Matrimony (*b*); Whereas on the contrary, if the former words had certainly induced Spouſals, and the words following Matrimony, but yet doubtfully, then the words following had received their interpretation of the words *precedent*, and ſo had induced no more but Spouſals *de futuro* (*c*).

(*a*) Alex. conſil. 152. vol. 2. lib. 1. conſil. Matr. conſil. ibidem. 52. Covar. tract. de Sponſal. ſecunda parte c. 4. §. 1. n. 6. in fin. Dec. in L. Actione C. de Tranſact. n. 7. qui refert hanc op. eſſe communem licet ipſe diſſentiat. Præpoſ. in c. ex parte de Sponſal. extra. n. 7.

(*b*) Menoch. Tract. de præſump. lib. 3. præſump. 3. n. 5. Jo. Baptiſt. Ferretus conſil. 86. Idem Menoch. conſil. 366. n. 36. verſ. qu'intus caſus.

(*c*) Hoſtienſ. Abbas & Præpoſ. in c. ex parte de Sponſal. extra. Bon. ſing. 338. Dec. in c. Juravit. de Sponſal. extra. Covar. Tract. de Sponſal. 2. parte. c. 4. §. 1. nu. 5. in fin.

13. Fourthly, albeit he or ſhe had no meaning or intent to Contract Matrimony (for that perhaps the Mans purpoſe was no other but to deceive the Woman, and procure her to yield to his Luſt) yet nevertheleſs, whereas the words of the Contract being ſuch as do import Matrimony, the Judge is to give no Credit to his or her proteſtation of any ſiniſter or ſophiſtical meaning, other than the natural propriety and uſual acceptation of the words do import (*d*); and therefore the words themſelves inducing Matrimony, the parties ſhall be adjudged thereby to have Contracted Matrimony (*e*), although (before God) they be not Man and Wife; for he which is the ſearcher of the heart doth well know

(*d*) Hoſtienſ. in c. ex literis el. 1. de Sponſal. extra. & ibi Panor. n. 6.

(*e*) c. tua nos. de Sponſal. extra. Hoſtienſ. & Panor. ubi ſupra. & Præpoſ. in d.c. ex literis eod. Tit. lib. 2. conſil. Matrimonial. conſil. ibidem 37. n. 19.

their

their deceit and defect of Mutual Conſent(*f*), without the which, there can be no Matrimony (*g*); and therefore, in his ſight, they are not Man and Wife (*h*). But mortal Man cannot otherwiſe judge of Mens meanings, than by their ſayings (*i*), for the Tongue is the Meſſenger of the heart (*k*); and although it ſometimes delivers a falſe Meſſage, yet doth the Law accept it for true, when as the Contrary doth not otherwiſe lawfully appear (*l*).

(*f*) Panor. in d.c. ex literis.el. 1. de Sponſal. extra. n 6. & DD. in d. c. Tua nos.
(*g*) c. Tua nos. de Sponſal. extra.
(*h*) eod.c Tua nos. & ibi DD. Panor.in d. c. ex literis n. 9.
(*i*) c. Tua de Sponſal. extra. lib. 1. conſil. matr. conſil. 68. n. 9.
(*k*) L. Labeo. §. cæterum. ff. de ſupell. Legat.
(*l*) prælleg. c. Tua nos. de Sponſal. extra. & ibi Panor. Præpoſ. & alij. lib. 1. conſil. matrim. conſil. ibidem. 68. n. 9, 10. Silveſtr. Prier. verb. matrim. el. 4. n. 1.

14. Fifthly, albeit he or ſhe having Contracted Matrimony, whether it be by words of the preſent time (*m*), or by words of the future time, having relation to the *execution* of Marriage (*n*), do afterwards Marry ſome other Perſon, yet is not the force of the former Contract thereby abated; but the Party which ſo Marrieth another Perſon (the ſame Perſon being diſmiſſed) is to be compelled to Effect the firſt Contract (*o*); Which Ampliation is undoubtedly true, the Contract being made by words of the *preſent time*, as [*I take thee to my Wife*, and *I take thee to my Husband* (*p*)]; but being made by words of the future time, as [*I will have thee for my Wife*] and [*I will have thee for my Husband*], howſoever the ſame words have relation to the *execution* of Marriage, the Ampliation doth not paſs without difficulty (*q*), as may appear by the former diſcourſe of the ſecond Concluſion, (*r*) unleſs the parties had added ſome other words expreſſing their preſent Conſent, as [*I will from henceforth*, or *from this time have thee to my Wife*, &c. (*s*)].

(*m*) c. ſi inter. de Sponſal. extra.
(*n*) c. ex parte. de Sponſal. extra. & ibi DD.
(*o*) d. c. ſi inter & c. ex parte lib. 1. conſil. matrimonial. conſil. ibidem. 52. n. 9.
(*p*) d.c. ſi inter. de Sponſal. extra.
(*q*) Covar. de Sponſal. ſecunda parte c. 4. §. 1. n. 5. Molinæus in addit. ad Dec. in c. Juravit. de probat. extra. Mart. in addit. ad Summam Hoſtienſ. Tit. de Sponſal. §. quot ſunt ſpecies
(*r*) Supra hoc ipſo. §.
(*s*) Nam tunc eſſemus in terminis d. c. ex parte de Sponſal. extra.

15. Sixthly

15. Sixthly, albeit both the parties contracting do not uſe the very ſame words, but other words, yet of the ſame importance, inducing preſent Conſent; As if the one of them ſay [*I take thee to my Wife*], or [*I ſwear that from hence forth I hold thee for my Wife*], and the other anſwer [*I am content* (*t*)], or [*I will have thee for my Husband* (*u*)], here is indiſſoluble Matrimony Contracted, as well as if this party had repeated the very ſame words firſt uttered by that party (*x*).

16. Seventhly, albeit the one party uſe no words at all, but ſignifie his or her preſent Conſent by *Signs* only; As if the one party ſay [*I take thee to my Wife, deſiring if thou likewiſe doſt accept me to thy Husband, to receive this Ring*], ſhe receiving the Ring, it is in effect as if ſhe had anſwered [*I do accept thee for my Husband* (*y*)].

(*t*) Lib. 1. conſil. Matr. conſil. ibidem. 42. n. 1. Panor. in c. ſi inter. de Sponſal. extra. n. 7. & Præpoſ. eod. c. n. 2. quorum opinio com. eſt teſte Præpoſ. ubi ſupra.

(*u*) Text. in c. ex parte de Sponſal. extra.

(*x*) DD. communiter in c. ſi inter. de Sponſal. extra.

(*y*) Gloſſ. & DD. in c. ultim. de Deſponſ. impub. extra. Lapus Alleg. 57. Baptiſt. à Villalob. verb. Matrimonial. n. 57. Menoch. de præſump. lib. 3. præſump. 2. n. 4.

17. Eightly, albeit neither the one party, nor the other, do utter the words of the Contract, but ſome third Perſon pronouncing the words; As if he ſay to the Man [*doſt thou take this Woman to thy Wife?*] and he anſwer [*yea*, or *I do*, or *what elſe?*] and likewiſe to the Woman [*doſt thou take this Man to thy Husband?*] and ſhe anſwer [*yea*] or [*I do ſo*] or [*what elſe?*] it is of the ſame Efficacy, as if the Parties themſelves had with their own Mouths pronounced all the words of the Contract, and ſaid reſpectively [*I take thee to my Wife*] and [*I take thee to my Husband*, &c.] (*z*). And if the Parents of the Children Contract Matrimony in

(*z*) Summa Angel. verb. Matrimonium 2. n. 10. Hoſtienſ. in c. Sponſam. de Sponſal. extra. lib. 1. §. ſi quis ita. ff. de verb. oblig. & ibi DD.

behalf

behalf of the Children, though the Children ſay nothing, yet being preſent and hearing the ſame, their ſilence is a ſufficient proof of their Conſent (*a*) and approbation.

(*a*) c. 1. §. ultim. de Deſponſ. impub. lib. 6 & ibi gloſſ. & DD.

18. Ninthly, albeit the words of the Contract, neither of their own natural ſignification, neither yet by common uſe and acceptation conclude Matrimony (*b*); Yet whereas the Parties do thereby intend to Contract Matrimony, they are inſeparable Man and Wife (*c*), not only before God, but alſo before Man; in caſe their *meaning* may lawfully appear (*d*).

(*b*) Verbi gratiâ dicitur muliери, [*vis talem?* vel *placet tibi talis?*] & *ipſa reſpondeat* [*volo*, vel *placet*] & *è contrario dicitur viro* [*vis ne talem mulierem?* vel [*placet tibi talis?*] & ipſe dicat, [*volo* vel *placet*] Boic. in c. ex parte, de Sponſal. extra. (*c*) Henr. Boic. in d. c. ex parte col. 1. (*d*) *Nam quod ad verba attinet, parum refert dummodo de Conſenſu appareat.* Boic. ubi ſupra. Summa Hoſtienſ. Tit. de Matrimonio. §. qualiter in fin. DD. in c. Tuæ de Sponſal. extra.

19. Tenthly, albeit there be no Witneſſes of the Contract, yet the Parties having verily, (though ſecretly) Contracted Matrimony, they are very Man and Wife before God (*e*); neither can either of them with ſafe *Conſcience* Marry elſewhere, ſo long as the other party liveth) (*f*); for proof is not of the Eſſence of Matrimony (*g*); and if it were, yet their Conſciences ſhall be as a thouſand Witneſſes before the Tribunal of the immortal God (*h*), though it be otherwiſe in the Judgment of mortal Man (*i*). As after more at large appeareth in the handling of Secret Contracts.

(*e*) Everard. conſil. xi. lib. 2. conſil. matr. conſil. ibidem. 24. n. 2. (*f*) c. in fin. 30. q. 5. Everard. ubi ſupra. (*g*) Gloſſ. & DD. in c. Tuæ. de Sponſ. extra. & in c. 1. & 2 de Cland. Deſponſ. Hiero. Schorf. inter conſil. Matrimon. lib. 2 conſil. 24. n. 23. (*h*) c. Cuſtod. & c. Inter. xi. q. 3. (*i*) c. Judicantem 30. q. 5. Everard. dict. conſil. xi.

20. The Eleventh Ampliation is, that albeit the Parties do not Contract Matrimony together at one inſtant, by ſpeaking and anſwering immediately one after another; but that ſome good diſtance of time doth paſs,

paſs, betwixt the promiſe of the one, and of the other; Nevertheleſs the Party whoſe promiſe is paſt, not having changed his or her mind, but perſevering ſtill in the ſame Will, until the other Party have likewiſe promiſed, the Contract is of Equal force, as if they had both conſented together, by ſpeaking immediately one after another: Marry (*k*) whether, or how long that Party whoſe promiſe is already paſt, is preſumed to continue or perſevere in the ſame mind, is a queſtion not altogether free from Controverſie; the Solution whereof appeareth in that place where we intreat of Spouſals contracted betwixt them that are abſent (*l*).

21. The twelfth Ampliation is, That when the words of the Contract are indifferent or equally flexible to the ſignification of Spouſals *de futuro*, or Matrimony; In this Caſe the Law preſumeth Matrimony to be contracted (*m*), except in certain Caſes elſewhere ſpecified (*n*).

(*k*) Præpoſ. in c. dilectus. & c. pen. de Sponſ. extra. & ibi Card. & Henr. Boic. per c. ult. de procur. in Sext. Covar. Tract. de Sponſal. ſecunda parte, c. 4. n. 7.

(*l*) infra §. 13.

(*m*) Anto. de Butr. in c. ex parte, de Sponſal. extra. n. 10. Lapus. Alleg. 56. Menoch. de præſump. lib. 3. tit. 3. in fin.

(*n*) ſupra. §. prox.

22. The thirteenth Ampliation is, That albeit this word *Huſband* or *Wife* be not expreſſed, yet is it underſtood; as when the Parties Contract in this Form [*accipio te in meum*] *accipio te in meam* (*o*)].

23. The fourteenth Ampliation is, When the Parties are contracted by theſe words [*Non habebo aliam in uxorem niſi te*, &c. *I will not have any other to my Wife except thee*] and [*I will not have any other to my Huſband except thee*] for, by the Judgment of the greater part, it is in effect as if the Parties had been contracted by theſe words [*I will have thee to my Wife*] *I will have thee to my Husband* (*p*)] which Sentence nevertheleſs

(*o*) Ferretus. conſil. 383. n. 8.

(*p*) Jo. Andr. Panor. & Præpoſ. in c. ex parte. de Sponſal. extra. Summa Silveſtr. in verb. Matrimonium 2. n. 10. Bapt. à Villalob. Theſaur. eom. op. verb. matrimonium, n. 34. Soarez eod. Theſaur. verb. matrimonium n. 89. Jaſ. & Sichard. in L. actione C. de tranſact. Menoch. Tract. de præſump. lib. 3. præſump. 3. n. 8.

leſs (to confeſs a truth) hath a very hard paſſage, being mightily withſtood by divers Writers of high regard (*q*), by whoſe Opinion, firſt of all, theſe words [*I will not have any other to my Wife except thee*] do not enjoy this ſenſe [*I will have thee to my Wife* (*r*).] And ſecondly, if it were granted that theſe words [*I will not have any other to my Wife except thee*] did peaceably enjoy this ſenſe [*I will have thee to my Wife*], yet ſince it is not without doubt and controverſie, whether theſe words [*I will have thee to my Wife, &c.*] induce Matrimony (*s*).; doubtleſs it cannot but be doubtful alſo, whether by theſe words [*I will not have any other to my Wife except thee*] Matrimony be induced; for if thoſe former plain direct words be not Matrimonial, certainly theſe later indirect and obſcure words are not (*t*). But concerning this ſecond Queſtion, namely, Whether theſe words [*habebo te in uxorem, I will have thee to my Wife*] import Matrimony? I ſhall not need to diſcuſs, having already uttered my full mind therein: Wherefore it ſhall be more requiſite to return to the former Queſtion, and examine what is the true ſenſe of theſe words [*non habebo aliam, &c.*] And whether they induce Matrimony or Spouſals, or neither? for there be divers Opinions herein.

(*q*) Anto. de Butr. & Zochus in d. c. ex parte *Contendentes Sponſalia tantum eſſe contracta.* Alciat. in L. actione C. de tranſact. n. 28. Covar. Tract. de Sponſal. ſecunda parte, c. 4. §. 1. n. 6, 7, 8 *ubi audacter, per verba ſuperius concepta, nec Matrimonium, nec Sponſalia contrahi.*

(*r*) Specul. in Rubr. de Sponſaſ. extra. in princip. n. 3. Anto. de Butrio. in d. c. ex parte Summa Roſell. verb. matrimonium el. 3. referens hanc Dc. Anto. *opinionem ſatis eſſe rationabil', quamvis in contrariam tandem, cum* Panor. *deſcendit Sententiam,* Anto. de Butr. Alciat. *& alii recentiores,* moti per l. ſi Sterilis. §. pen. de Action. Emp. ff. (*s*) *ut paulò ſuperiùs hoc ipſo* §. (*t*) Covar. Tract. de Sponſal. ſecunda parte. c. 4. §. 1. n. 6, 7, 8. &c.

24. The firſt Opinion is, (as I ſaid) That theſe words [*Non habebo aliam in uxorem niſi te, I will not have any other to my Wife except thee*] are equivalent and all one in effect to theſe words [*habebo te in uxorem, I will have thee to my Wife* (*u*)], which words, if the received

(*u*) Panor. & Præpoſ. poſt Jo. And. in c. ex parte. de Sponſal. extra. Jaſon. Sichard. & alii in L. actione C. de tranſact. *quorum opinionem communiter approbatam eſſe, Teſtes ſunt locupletiſſimi.* Baptiſta Villalob. & Emanuel Soarez. Theſaur. com. op. verb. matrimonium, ille nu. 34. iſte nu. 89. & Menoch. Tract. de præſumpt. lib. 3. præſump. 3. n. 8.

Sentence be true, induce Matrimony (*x*). The Reaſon of this Opinion doth chiefly rely upon this adverſative [*niſi, except*] for ſuch is the efficacy or operation thereof, that it doth ſtill put the Contrary to that which goeth before it (*y*): As if the Sentence going before be an Affirmative, that which followeth is Negative (*z*); or if the Sentence going before be Negative, that which followeth is Affirmative (*a*). For Example; ſay a Man writeth thus in his Teſtament [*I give and bequeath unto thee all my Books except the* Code (*b*)], or contrariwiſe [*I do not give or bequeath unto thee any of my Books, except the* Code (*c*)]; In the former Inſtance this word [*niſi*] following an Affirmative Propoſition, ſtandeth Negatively; as though the Teſtator had ſaid [*My* Code *I do not bequeath unto thee* (*d*)]. In the ſecond Inſtance, this word (*but*) following a Negative Propoſition ſtandeth Affirmatively; as if the Teſtator had ſaid [*I do bequeath my* Code *unto thee* (*e*)]. And ſo in our Caſe, whereas any Man ſaith thus [*I will not have any other to my Wife except thee*], here this word (*except*) following a Negative Propoſition, doth import an Affirmative; and ſo is in effect as if he had plainly ſaid [*I will have thee to my Wife* (*f*)].

(*x*) Præall. c. ex parte, de Sponſal. extra. & communiter DD. in c. ex literis. cl. 1. eod. Auguſt. Berous q. 6. Vivius & Soarez. Theſaur. com. op verb. Matrimonium.

(*y*) L. Actione C. de tranſact. &. ibi DD. Spiegel. Lexic. verb. [*niſi*].

(*z*) L. 1. §. Idem Neratius. ff. depoſit. Rebuff. in L. verum de Verb. Sig. ff.

(*a*) c. peccatum. de Reg. Jur. in Sext. Bar. & alii. in l. cum §. qui injuriarum ff. ſi quis caution. & in d. L. Actionem. C. de tranſact.

(*b*) L. nam quod liquidè. §. ultim. de pen. Legat. ff. de

(*c*) Alciat. in L. Actione. C. de tranſact. n. 25.

(*d*) d. L. nam quod. §. ultim. de pen. Leg DD. l. 1. de Reg. Jur. ff.

(*e*) Alciat. in d. L. Actionem n. 25. *Licet (inquit) alii abſque ratione diſſentiant, ut* Bald. in c. *cum olim nobis* de elect. extra. n. 1. Tu vide Jaſ. in L. 2. C. de bonorum poſſ.

(*f*) Sichard. in d. L. Actione & communiter Canoniſtæ in c. ex parte de Sponſal. extra.

25. The ſecond Opinion is, That by words above recited, Spouſals only, and not Matrimony, is contracted (*g*): The Reaſon of which Opinion is this, namely, Becauſe by the Civil Law, if a Man Covenant with thee not to ſell his Houſe to any other except to thee (*h*);

(*g*) Anto. de Butr. Cald. & Zochus in c. ex parte. de Sponſ. extra. Alciat. in L. Actionem. C. de tranſact. n. 28

(*h*) L. ſi ſterilis. §. ſi fundum. ff. de action. Emp. & vend. *nec refert quòd Juriſconſultus utatur dictione [quàm] nos verò loquamur de dictione [niſi,] Cum idem ſit [dicere non vendam domum hanc niſi tibi] & [non vendam domum hanc alii quàm tibi] adnotante* Laur. Vall. lib. 3. elegan. c. 54. & Covar. Tract. de Sponſ. ſecunda parte, c. 4. §. 1. n. 18.

albeit

albeit he ought not to ſell his Houſe unto any but unto thy ſelf; yet neither is he to be compelled preciſely thereunto (*i*), except in certain Caſes (*k*); neither if he do ſell it to any other, contrary to his Covenant, is the Sale therefore void (*l*), though otherwiſe he be anſwerable unto thee for ſo much as thou hadſt intereſt, not to have been deceived thereby (*m*): And ſo (to apply our Caſe to his) whereas the Man ſaith to the Woman [*I will have none other to my Wife except thee*], albeit he ought not to take another Wife, yet is he rather to be moniſhed than compelled to marry this Woman (*n*); and if he do indeed marry another Woman, contrary to his Promiſe, this Marriage (according to this Opinion) is not to be diſſolved (*o*), howſoever otherwiſe the Man be puniſhable *propter læſionem fidei* (*p*) for breach of his Promiſe (*q*): And this Opinion (even by the Confeſſion of thoſe which hold the contrary) doth ſeem very reaſonable (*r*). As for the fundamental Reaſon wherein the former Opinion is wholly rooted, it is thus anſwered: Admit the efficacy of the word [*niſi*] be ſuch, that following a Negative it doth obtain the force of an Affirmative, yet this affirmation is not of a preſent Act, but of a future Ability or Poſſibility (*s*); for confirmation whereof, the Authors of this ſecond Opinion do uſually alledge two notable places, the one borrowed out of the Civil, the other out of the Canon Law: That of the Civil Law is this; One making his Teſtament, and diſpoſing about the Liberty of his Bondman *Oneſiphorus*, ſaith thus [Oneſiphore, *liber nè eſto, niſi rationes excuſſeris* (*t*)]; Oneſiphorus, *be not thou free,*

(*i*) Jaſin L. ſi eum §. qui injuriarum. ff. ſi quis Caution. n. 37. Zaſ. in L. qui Romæ. §. cohæredes ff. de verb.ob. n. 3.

(*k*) De quibus Jaſ. ubi ſupra. poſt. Bar. in d. L. eum §. qui injuriarum. ff. Si quis Caution.

(*l*) L. Stipulationes non diviſuntur. verſic. Celſus. ff. de verb. oblig. Cagnel. in L. 2. C. de pact. inter Emp. ex vend. n. 12. *ubi diſtinguit inter pactum de retro vendendo, & pactum de reſtituendo.*

(*m*) Carol. Molin. in rep. L. unic. c. de eo quod intereſt. n. 46. d. L. Stipulationes. verſic. Celſus. & ibi DD. Jaſ. in L. ſi eum injuriarum ff. ſi quis Caution. n. 41.

(*n*) c. requiſivit. de Sponſal. extra. (*o*) Anto. de Butr. & Zochus in d. c. ex parte. (*p*) c. 1. de pœnis. lib. 5. Provincial. conſtitut. Cant. (*q*) *Siquidem læditur fides, violato promiſſo, etiamſi nullum interveniſſet juramentum.* Lindwood. in d. c. 1. de pœnis. verb. fidei tranſgreſſ. (*r*) Summa Roſel. verb. Matrimonium. q. 3. (*s*) Anto. de Butr. in d. c. ex parte. & ibi Præpoſ. n. 7. Henr. Boic in c. de quarta. de præſcript. extra. (*t*) L. Titia. §. fin. de manumiſſ. Teſtam. ff. & ibi gloſſ.

except thou diſpatch thine Accompts;] The Accompts being diſpatched, yet is not the Servant thereby ſet at Liberty (*u*), but in poſſibility only to be made Free (in caſe the Heir will), whereas otherwiſe it was impoſſible for him to obtain a Freedom, the Teſtator having prohibited the ſame, except he made his Accompts (*x*). The place of the Canon Law is extant amongſt the Rules thereof, where it is thus written, *Peccatum non dimittitur, niſi reſtituatur ablatum* (*y*); the Sin is not remitted, unleſs the thing wrongfully taken be reſtored. Now the thing unlawfully taken being reſtored, yet is not the Crime preſently remitted (*z*), for there be divers other things over and beſides Reſtitution, neceſſary to the obtaining Remiſſion (*a*); ſo that by Reſtitution only, that impoſſibility is cut off, which otherwiſe did hinder the Remiſſion (*b*) of the Offence; and that which before was denied to be poſſible, as the Caſe then ſtood, is now affirmed for poſſible, the Caſe being altered, and the Exception compleated (*c*): Wherefore it appeareth by thoſe two Authorities, That albeit the word [*niſi*] following a Negative Sentence, have the force of an Affirmative, yet this affirmation is not of the Act it ſelf, but of the poſſibility thereof (*d*). Howbeit, if we will take the pains to view theſe two laſt Examples with a diligent Eye, and confer them with our Caſe, we ſhall clearly perceive that they vary not a little from this; for in theſe two Caſes (beſides other differences (*e*)), the Exception is governed by another Verb, and ſo the Sentence is made Conditional (*f*), whereas in our Caſe the Exception is governed by the ſame Verb, and ſo the Sentence remaineth ſimple (*g*); and

(*u*) *Immò potius audiri quam dari libertatem ex verbis quæ proponuntur reſpondet.* J. C. in d. §. ultim.

(*x*) Bar. in d. §. ultim. L. Titia. de manumiſſ. Teſta. ff. Alciat. in L. actione. C. de tranſact. n. 33. Peckius in c. peccatum de Reg. Jur. in Sext. verb. [*niſi*] Molin. in addit. ad Dec. in d. L. actione.

(*y*) c. peccatum. de Reg. Jur. in Sext.

(*z*) Phil. Franc. & Peckius in d. c. peccatum.

(*a*) Phil. Franc. & Peckius ubi ſupra. Alciat. in L. actione C. d. tranſact. n. 33.

(*b*) Alciat. in d. L. Actionem. & Peckius in d. c. peccatum n. 4. & ibidem Franc.

(*c*) Alciat. Franc. & Peckius ubi ſupra.

(*d*) Vide Covar. Tract. de Sponſal. ſecunda parte, c. 4. §. 1. n. 6. (*e*) Vide DD. in c. Actione. C. de Tranſact. (*f*) Jaſ. in L. ſi eum §. qui injuriarum ff. ſi quis Caution. n. 26. Alciat. in l. actione. C. de tranſact. Henr. Boic. in c. quarta de præſcript. extra. Covar. ubi ſupra. (*g*) Alciat. in Præal. l. actione. & Jaſ. ac alii in d. §. qui injuriarum. & in d. L. actione.

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therefore we are not to be removed from the former Opinion by theſe Examples, ſo far diſtant, and ſo apparently different from this Caſe of ours (*h*). If you will not ſuffer me thus to paſs, but pull me back again to the Conſideration of the firſt Reaſon and Ground of this ſecond Opinion, and tell, that though you Covenant with me not to ſell your Houſe to any other, except to me; In this Caſe the Exception is governed by one and the ſame Verb (*i*), and yet nevertheleſs the Houſe is not hereby perfectly bought and ſold (*k*), and ſo infer, That when as the Man ſaith [*I will have none other to my Wife except thee*] and ſhe likewiſe [*I will have none other to my Husband except thee*], this is no more a perfect Contract of Matrimony, than that a perfect and abſolute Sale of the Houſe. I deny the Argument: For admit a Man do Covenant by direct words, that he will ſell his Houſe to me for ſuch a price; and I again do Covenant and Promiſe, that I will buy the ſame Houſe for the ſame price; by this Covenant the Houſe is not yet abſolutely bought and ſold (*l*): But if a Man ſay to a Woman [*I will have thee to my Wife*], and ſhe to him [*I will have thee to my Husband*], this is a perfect Contract of indiſſoluble Matrimony (*m*), as hath been already proved (*n*). Wherefore ſince it is apparent that divers words are ſufficient to prove a perfect Contract of Matrimony, which will not ſuffice for a perfect Sale (*o*), it followeth, That if any do reaſon after this manner, theſe words ſuffice not to make the Sale perfect, *Ergo* they are not ſufficient to make the Contract perfect (*p*), this Argument is not ſound. Thus we ſee that this ſecond Opinion, how weighty ſoever

(*h*) *Ex ſeperatis non refertur* L. ultim. ff. de Calum. L. Papinianus de minor. ff. & ibi Bart.

(*i*) Alciat. in L. actione C. de tranſact. n. 24. 29. Bar. in l. fi eum §. qui injuriarum ff. ſi quis Cautionib. n. 9. & ibi Jaſ. n. 26.

(*k*) Angel. in L. qui Rom. §. cohæredes. de verb. oblig. ff. & ibi Zaſius n. 3. Jaſ. in L. fi eum. §. qui injuriarum. ſi quis caution. ff. n. 37, 41. Molin. in rep. L. unic. de eo quod intereſt. C. n. 46.

(*l*) Covar. Tract. de Sponſal. ſecundâ parte, c. 4. §. 1. n. 6. verb. Sed ille. Text. gloſſ. in L. vendentis C. de contrahend. Empt. DD. in L. Servi electione ff. de leg. 1. & ſupra §. (*m*) c. ex parte de Sponſal. extra. & ibi Panor. & cæteri Canoniſt. Menoch. de præſump. Lib. 3. præſump. 3. (*n*) ſupra. eod. §. 11. (*o*) gloſſ. in L. In vendentis. C. de contrahend. Emp. Jaſ. Alciat. & alii DD. in L. Servi electione. ff. de leg. 1. (*p*) Vide Covar. d. c. 4. §. 1. n. 6. & vide ſupra hoc ipſo §. 11.

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it ſeem at the firſt lift, yet being equally ballanced with the former, it is found to be the lighter, whether we reſpect the Credit of the Authors of either Opinion, or ponder the Gravity of their Reaſons.

26. The third Opinion is, That theſe words [*Non habebo aliam in uxorem niſi te*, &c.] induce neither *Matrimony* nor *Spouſals* (*q*), and that for two Cauſes. The firſt is, Becauſe the words are meer Negative, at leaſt, the Authors of this Opinion contend ſharply that they be ſo (*r*), and therefore induce neither Matrimony nor Spouſals (*s*). The Argument is very ſtrong; for if the Sentence be wholly Negative, it doth not affirm any thing, and if it affirm nothing, then doth it not affirm either Matrimony or Spouſals (*t*); nor is the Antecedent very weak, if the Caſe were to be examined and diſcuſſed by the only Precepts and ſtrict Rules of Logick (*u*); for if *Cæſar* (that I may uſe their own Example) do promiſe that he will not fight this year, except againſt the *Turk*, he doth not hereby Promiſe, that he will fight this year againſt the *Turk* (*x*); nor can this Collection be juſtly defended for Infallible: No Man diſputeth except *Socrates*, *Ergo*, *Socrates* diſputeth only (*y*); it being firſt ſuppoſed that ſome Man doth diſpute, which being a matter in Fact, is not to be preſumed (*z*). Marry, this thing being preſuppoſed that ſome Man doth diſpute, if then none elſe but *Socrates* doth diſpute, it muſt needs follow then that *Socrates* diſputeth (*a*); even ſo whiles any Man ſaith, That he will have no Wife, except thee; it doth not follow therefore he will have thee, unleſs he had firſt promiſed to have ſome Woman to his Wife (*b*). The other

(*q*) Didac. Covar. Tract. de Sponſal. ſecunda parte, c. 4. §. 1. n. 7. & 8. Idem aſſerit Palud. in 4. diſtinct. 27. q. 1. Artic. 1. col. 2.

(*r*) Covar. & Palud. ubi ſupra.

(*s*) Covar. & Palud. ubi ſupra. vide Bald. in L. actione C. de tranſact. op. prima. & vide L. decem. de verb. ob. & L. Julianus de repudiis ff. & ibi Bart. & DD.

(*t*) *Unde Verſiculus* [*Syllogizari non eſt ex particulari. Neque negativis recte concludere ſivis.*]

(*u*) Covar. ubi ſupra. *Attamen Perierius non dubitat affirmare, quod omnes etiam dialectici hæc verba* [*non habebo aliam niſi te*] *ſic exponunt* [*Habebo te & non aliam*] Verb. Matrimonium 2. n. 10.

(*x*) Covar. Tract. de Sponſal. ſecunda parte, c. 4. §. 1. n. 7.

(*y*) Covar. d. §. 1. n. 8. verb. nec valet, &c.

(*z*) L. In. bello. §. facti ff. de captiv. L. emancipati C. de Colla.

(*a*) Covar. d. §. 1. n. 8. in fin.

(*b*) Covar. ubi ſupra. & Hadrian. in 4. queſt. 12. de matrim.

Cauſe

Cause of this third Opinion proceedeth from the Contemplation of the Etymology, or proper Signification of this word [*nisi*] the which is ingendred or compounded of [*non*] and [*si* (*c*)] and doth properly signifie [*si non, if not* (*d*)], and so these words [*non habebo aliam in uxorem nisi te, I will not have any other to my Wife but thee*] are thus to be understood, [*non habebo aliam in uxorem si non te, I will not have any other to my Wife, if not thee*], which being true, the true Sense and Meaning is no other in Substance, than if the Party had said, *If hereafter I shall resolve to lead my life in Wedlock, of which thing I am not yet resolved, I do here promise thee, that when I am so resolved, I will have thee to my Wife, and not any other Woman* (*e*). By which Promise, neither Matrimony, neither yet Spousals, are contracted, at least simply or absolutely; Therefore if the Party resolve never to Marry, but lead a single Life until his Death, neither is he to be urged to the contrary, neither can he be touched with the Breach of his Promise in this Case (*f*). To return to the former Cause, where it is constantly affirmed, that the words be meer Negative (*g*). Surely howsoever this Assertion might peradventure (in regard of the Rules and Traditions of Dialectical Discipline) procure sundry Favourers in Schools and Places of Disputation, where singular and strange opinions are very plausible and acceptable, especially to such as have a good Conceit of their own Wit and Learning (*h*); Yet in regard

(*c*) Jas. in L. si eum §. qui injuriarum ff. si quis Caution. n. 32. Alciat. in l. actione c. d. transact. n. 24. Dictionar. Cooperi. verb. [*Nisi*] & Calepin. Cornucop. verb. [*nisi*] Addic. ad Laur. Vall. lib. 2. elegan. c. 19.

(*d*) gloss. in l. Sancinius C. de donat. Calepin. & Cooperus ubi supra.

(*e*) *Hunc esse illius orationis sensum acriter contendit.* Covar. in d. Tract. de Sponsal. secunda parte, c. 4. §. 1. n. 8. vers. Ex quibus audacter, &c. Cui accedit Molin. in addit. ad Dec. in c. juravit de probat. Nec longè abest Specul. in Rub. de

Sponsal. n. 3. (*f*) Covar. ubi supra. & Specul. in d. Rub. de Sponsal. verb. possibile. lib. 2. conf. matrim. consil. ibidem 5. (*g*) Covar. Tract. de Sponsal. secunda parte, c. 4. §. 1. n. 7.

(*h*) Audi quæso Corasium in Præfat. Tract. de communi up. sic scribentem, *Communis (inquit) opinio quàm sit in Scholis contempta, nemo est qui nescit; Juris namque Interpretes ingenii tantum viribus confisi omnium rerum veritatem solâ disputatione consequi volentes, communem opinionem maledicis dentibus nunquam desinunt lacerare, inde nascitur proverbium. Communis opinio ergo falsa,* &c.

of

of the meaning and intent of the ſpeaker (*i*), and in reſpect of the favour of Matrimony (*k*), it would find but few Patrons in Conſiſtories and places of Judgment; (*l*) the rather ſeeing the whole Army, even of the graveſt and learnedeſt Writers, as well Civilians, as Canoniſts, do generally defend the Contrary (*m*); Indeed if the Party had ſaid no more but thus [*I will not have any other to my Wife*], in this Caſe I will not deny the Sentence to be negative; And if any Man ſay thus [*there is none good*], or thus [*no Man may put away his Wife*]; Theſe (I confeſs) be meer Negative Propoſitions: But if he do not ſtay here, but ſhall add an Exception to theſe Negatives, and ſay, [*there is none good but God* (*n*)], or] *no Man may put away his Wife except for Fornication* (*o*)], what elſe (in good ſooth) is this but to affirm that God is good; and that a Man may put away his Wife for Fornication? So in our Caſe, when as the Party after he hath ſaid [*I will not have any other to my Wife*] doth not there ſtay, but doth add an exception to this Negative, ſaying (*I will not have any other to my Wife except thee*] this exception following a Negative Propoſition, hath the force of an Affirmative (*p*). And ſo (if we be not diſpoſed to Frowardneſs) it is in effect, as if the Party had ſaid [*I will have thee to my Wife and no other*] (*q*). Yea, but all this is not ſufficient to ſatisfie the untoward minds of ſome Perſons, that are ready to reply, That although it be ſo, that he which ſpeaketh thus [*none is good but God*], doth affirm that God is good, and that he which ſaith [*no Man may put away his Wife except for Fornication*] doth affirm that for Fornication a Man may put away his Wife. This is true ſay they, *non ex propria vi dictionis* [*niſi*], *Sed*

(*i*) *Quæ mens vel præcipuè attendenda eſt in hâc re.* Bald. in l. Actionem C. de tranſ. ct. n. 2.

(*l*) *Siquidem conſulendo & judicando non licet à communi opinione recedere,* Aiunt Hoſtienſ. Jo. And. Anto. de Butr. & Panor. in c. 1. de Conſtitut.

(*m*) Jo. And. Abb. Panor. Præpoſ. in c. ex parte de Sponſal. extra. Summa Angel. Roſel. & Silveſtrin. verb. Matrimon. Baptiſta à Villalob. Emanuel Soarez. Theſaur. com. op. verb. matr. Jaſ. Sichard. & alii in L. actione C. de tranſact. Menoch. de præſump. lib. 3. præſump. 3. lib. 1. conſil. matr. fol. 119. n. 1.

(*n*) Marc. c. 10. verſ. 18. & Luc. c. 18. verſ. 19.

(*o*) Matth. c. 19. 1 Epiſt. ad Corinth. c. 7.

(*p*) Jaſ. & Sichard. in. L. actione C. de tranſact. Panor. & Præpoſ. in c. ex parte, de Sponſal. extra.

(*q*) Summa Silveſtrin. verb. Matrimon. 2. n. 10.

ex

ex materiâ Subjectâ & naturâ rei (*r*), not by the proper force of this word [*but*, or *except*], but by reaſon of the ſubjected Matter, and nature of the thing. For it is neceſſarily ſuppoſed, *ex naturâ rei*, that ſome is good; for if none were good, the Devil (being wholly evil) would ſoon marr all (*s*); Wherefore this being granted, that ſome is good, Then none being good, but God, it followeth concludently, That God is good. The like may be ſaid concerning Divorce, where it is preſuppoſed *ex Subjectâ Materiâ*, that for ſome Cauſe the Husband may put away his Wife; ſeeing then, not for any Cauſe, except for Fornication, the Collection is true, *Ergo* for Fornication ſhe may be put away (*t*). But in our Caſe (ſay they) neither the nature of the thing, neither the Subjected Matter doth inforce any neceſſity of this preſumption, *viz.* That he which ſaith [*I will not have any other to my Wife, except thee*] did intend that he would have ſome Woman to his Wife (*u*), becauſe it may be that the Man in ſo ſaying, did mean neither to Marry her, nor any other (*x*); and therefore there is not the like Conſequence in this Caſe, as in thoſe Caſes. To this Objection thus; Who doubteth, but it may be, that he which ſaith [*I will have thee to my Wife*], doth never mean to have her (*y*); for ſome Men can ſay one thing, and think the contrary (*z*). And ſo it may be that he which ſaith [*I will not have any other to my Wife, except thee*], doth no more mean to have her to his Wife than any other; but this is very unlikely (*a*): Seeing then by all reaſonable Conſtruction the Contrary is more probable, I anſwer as doth that excellent Lawyer, who (for his manifold Diſtinctions fit and ready at every need) can never be ſufficiently commended, namely *Baldus*, writing after this manner, *Opponitur quod dictio* [*niſi*] *nil ponit, etiamſi negatio præcedat. Solutio, Si mens loquentis patitur tunc ponit; ſi*

(*r*) Vide Covar. Tract. de Sponſal. ſecunda parte, c. 4. §. 1. n. 8. *ubi alia invenies exempla noſtris non diſſimilia, ſed magis ignota Noſtratibus.*

(*s*) c. viſis. 16. q. 2. c. Nec mirum. 26. q. 5. Baldus in l. 1. §. 1. C. de leg.

(*t*) *Id quod ipſe Covar. ingenue fatetur, licet aliis exemplis, ſed non tam familiaribus utatur*, in d. §. 1 n. 8.

(*u*) Covar. d. §. 1. n. 9.

(*x*) Covar. ubi ſupra & Palud. in 4. diſtinct. 27. q. 1. ar. 1. col. 2. Molin. in addit. ad Dec. in c. Juravit. de probat. extra.

(*y*) *Quo caſu judicatur pro Matrimonio, in foro judiciali, ſecus in pœnitentiali c. tua nos.* de Sponſal. extra.

(*z*) d. c. Tua & ibi DD.

(*a*) *Scilicet Cautas inferius deſcriptas.*

mens loquentis non patitur, tunc non ponit (*b*). *Its Objected* (faith *Baldus*) *that this word* [niſi, *but*, or *except*] *doth affirm nothing, although a Negative go before. The Solution is this, if the meaning of him that ſpeaketh doth ſuffer, it affirmeth, if his meaning do not ſuffer, it doth not affirm.* Now in our caſe his meaning doth not only ſuffer this affirmation, but can hardly abide the Contrary: Alſo ſundry inconveniences and abſurdities would enſue (*c*); for if his meaning were ſimply not to have any Wife at all (as is objected) To what end (I pray you) did he ſay [*I will have no other*]? But eſpecially wherefore did he make any Exception, after he had ſaid [*I will not have any other to my Wife*]? Verily this Exception expreſſed in theſe words [*except thee*] had been wholly Superfluous (*d*) and idle, (*e*) or rather fraudulent and deceitful (*f*). Now therefore leſt either the words ſhould be accounted idle (*g*), in ſo weighty a Cauſe, or the meaning deceitful (*h*), in ſo favourable a Matter, it is probably, juſtly, and charitably collected, That the true ſenſe and meaning of theſe words [*I will not have any other to my Wife, except thee*] is all one as if the Party had ſaid [*I will have thee to my Wife and no other* (*i*)]; and conſequently the Sentence is not mere Negative. Well, now let us try whether the other Cauſe of this third Opinion be worthy of ſuch an Effect. It is ſaid that this word [*niſi*] being formed of [*ſi & non* (*k*)], doth properly ſignifie [*ſi non* (*l*), *if not*]; and therefore the ſenſe of the former words, [*I will not have any other to my Wife, except thee*], is no more in effect,

(*b*) in L. Actione c. de tranſactionn. n. 2.

(*c*) *Ut autem evitetur abſurdum, & mens loquentis ſervetur uſque adeo permiſſa eſt interpretatio, ut vel à proprietate verborum recedere licet* L. nam abſurdum ff. de bon. liber. Baldus in L. Pomponius ff. de nego. geſt.

(*d*) *Superfluitatis vitium quàm diligentiſſimè fugiend.* L. ſi quando ff. de leg. 1.

(*e*) Bald. in L. ne quicquam 1. §. planè. de Offic. Proconſul. ff. *aliquid operari debent verba.*

(*f*) *Sed dolus non præſumitur.* l. dolum. C. de dolo & ibi DD.

(*g*) *Nullum verbum etiam minimum debet eſſe otioſum, Immò nec Syllaba, ſi fieri poſſit, debet eſſe ſuperflua.* Gloſſ. in c. ſolitæ de major. & ob. extra. Bald. in Rub. de contrahend. Emp. C. (*h*) c. Tua nos, & ibi Panor. de Sponſal. extra. (*i*) *Immò non ſolum Juriſtæ, ſed & omnes dialectici ita exponunt hujuſmodi verba*, inquit Silveſter. Prier. verb. Matrimonium 2. n. 10. (*k*) Alciat. in l. actione C. de tranſac. n. 24. Jaſ. in L. Si eum §. qui injuriarum. ff. Si quis caution. n. 32. Gloſſ. in l. Sancimus C. de Donat. Calepin. Cornucop. vert. [niſi].

than

than if the Party had ſaid [*If I have not thee to my Wife I will never have any other* (*m*)], which words induce not Matrimony nor Spouſals, &c. (*n*) Whereunto briefly this is the Anſwer; This word [*niſi*] is ſometimes placed in the beginning of a Sentence, and ſometimes it followeth a Sentence (*o*); when it is placed in the beginning of a Sentence, then doth it ſignifie [*Si non* (*p*), *if not*]; and ſo maketh the Propoſition conditional (*q*). As for example, if any ſay [*niſi venero, dabo tibi decem libras* (*r*) *i. e. ſi non venero, except I come I will give thee ten pounds*]; That is to ſay, [*if I do not come*], or as the Pſalmiſt ſaith [*niſi Dominus cuſtodierit Civitatem fruſtra vigilant Cuſtodes* (*s*), *i. e. Si non cuſtodierit*, &c. Except the Lord keep the City, in vain do the Keepers watch, that is to ſay [*if the Lord do not keep*, &c.]: When it followeth a Sentence, then we are to conſider, whether it be joyned to another Verb or not (*t*); if it be joyned to another Verb, then it doth alſo enjoy the Signification of [*Si non*, *if not*], as in the former Example, whereby the Propoſition is made Conditional (*u*), [*non dimittitur peccatum niſi reſtituatur ablatum* (*x*), *i. e. Si non reſtituatur, the Sin is not remitted, except the thing taken be not reſtored*, that is to ſay, *if it be not reſtored*, &c.]: But if it be not joyned to another Verb, but is ruled by the Verb aforegoing, Then by the Opinion of the beſt and moſt Authors, it doth not enjoy the Signification of [*Si non, if not*,] nor maketh the Pro-

(*m*) Covar. tract. de Sponſal. 2. parte c. 4. §. 1. Adde Molin. in addit. ad Dec. in c. juravit. de probat. extra.

(*n*) Covar. ubi ſupra. lib. 2. conſil. matr. conſil. ibidem. Spec. in Rub. de Sponſal. extra. verb. poſſibile.

(*o*) Bar. Jaſ. & alii in L. Si eum §. qui injuriarum ff. Si quis Caution.

(*p*) Bart. in d. §. qui injuriarum. n. 9. & ibi Jaſ. n. 26. verb. ſubbit *Sunt tamen qui diſtinctionem hanc reprehendunt*, ut per Alex. in d. §. n. 9. & Jaſ. ubi ſupra. *Quinimò & ipſe* Bart. *ibi non conſtat, Sentiens diſpoſitionem ſemper præcedere, attento rei*

intellect. in l. 1. ff. de Cond. Demon. *Sed nos verborum ordinem reſpicimus.* (*q*) L. Obligationum §. Conditio de action. & oblig. Bar. in d. L. Si eum §. qui Injuriarum ff. Si quis Caution. n. 9. (*r*) *Niſi quoties principium Sententiæ eſt, judicativum deſiderat*, ait Laur. Vall. lib. 2. Elegan. ſed apud. Bar. *Niſi in principio orationis collocatum ſubjunctivè jungitur, eò quòd nec ut rationale nec ut caſuale, ſed ut conditionale habetur.* (*s*) Pſal. 127. ubi tranſlator. *quia niſi conditionaliter accipitur, licet in principio ſubjunctivum annectit.* (*t*) Bar. in L. Si eum §. qui injuriarum ff. Si quis Caution. n. 8. (*u*) Bar. in d. §. qui injuriarum n. 8. verb. ſi vero. per. l. fidei commiſſi. §. ſi fidei Commiſſum ff. de leg. 3. & L. 1. & 2. de *In diem addi.* (*x*) C. peccatum de reg. jur. in Sext.

position conditional, but ſtandeth adverſatively, eſtabliſhing the Contrary, to that which went before it (*y*); So that if the Propoſition aforegoing were affirmative, the Exception is negative; Or if the Propoſition were negative, the exception is affirmative (*z*), as hath been heretofore confirmed. Now in our Caſe the word [*niſi, except*] is not placed in the beginning of the Sentence, neither is it joyned to another Verb, but dependeth of the former; and therefore it doth not enjoy the ſignification of [*Si non, if not*] as is pretended, but rather of this word [*præter*, or *præterquam*, *beſides*, or *but*] implying the Contrary to that which went before (*a*); eſpecially in favourable Cauſes (*b*). Thus we may behold the weakneſs of this ſecond Cauſe, and how unworthy it is of that Effect, which notwithſtanding it hath wrought in ſome Mens minds.

(*y*) Bart. ubi ſupra. & in Authent. C. de tranſac. & ibi Bald. Alex. Jaſ. Dec. & Alciat.

(*z*) DD. in de L. actione.

(*a*) L. nam quod Liquide ff. de pen. Leg. §. pen. Bar. in L. Si eum §. qui injuriarum. Si quis Caution. ff. n. 6, & 7. & ibi Jaſ. n. 35. DD. in l. 1. ff. de pig. action. DD. in l. actione C. de tranſac.

(*b*) Secus in Materia odioſa. Jaſ. in d. §. qui injuriarium n. 36. gloſſ. in clem. 1. de uſuris. in verb. facere Bald. in L. Seco. §. uxor ff. de Ann. Leg.

27. The fourth Opinion is, That if the words be conceived after this manner, [*I will not have any to my Wife, except thee*]; In this caſe Spouſals are contracted (*c*): But if the words be conceived in this form [*I will not have any other Woman to my Wife, except thee*], in this Caſe neither Matrimony nor Spouſals is contracted (*d*); The reaſon of which Opinion I cannot eaſily reach unto; and for ought I underſtand this is a *diſtinction* without a *difference*, that is to ſay, a little variation in words, but in ſenſe none at all; which words alſo (me thinks) be more pregnant in the later Caſe, where notwithſtanding they are condemned for barren and fruitleſs. For while the Man ſaith [*I will not have any other, &c.* (*e*)] it ſhould ſeem that by excluding others

(*c*) Hadrian. in 4. q. 12. de matrim. Cujus meminit Covar. in Tract. de Sponſal. 2. parte c. 4. §. 1. nu. 6. verſus fin.

(*d*) Hadr. & Covar. ubi ſupra.

(*e*) *de naturâ hujus dictionis* (*aliis*) vide Bald. in L. Conventulam C. de Epiſc. & Cler. & in L. ſi fugitivi C. de ſervis fugi.

he

he doth include her to whom he ſpeaketh (*f*): Whereas in the former Caſe there is not the like Emphaſis, for defect of like words, although aſwel in the one, as in the other, the words be ſufficient to induce Matrimony, becauſe of theſe words (*except thee*) uttered in both Caſes, the which words following a negative, have the force of an affirmative (as I have often foretold) and ſo are as if he had ſaid plainly [*I will have thee to my Wife* (*g*)].

(*f*) Specul. in Rub. de Sponſal. & matr. extra. n. 3. *quamvis ex hoc ſolo, quod vir mulieri dicat* [*non habebo aliam in uxorem*] *non opinor induci Matrimonium niſi etiam addiderit* [*niſi te.*] Spec. Præpoſ. in c. ex

in. d. Rub. n. 4. Summa Angelic. verb. matr. 2. n. 12. in fin. parte. de Sponſal. extra. DD. in L. actione C. de tranſac. (*g*) Panor. &

28. Fifthly, by the Opinion of moſt who labour in the defence of the ſecond Opinion above delivered, If the words of the Contract be formed in the Preſent Tenſe, as [*Nolo habere aliam in Uxorem, niſi te, I will*, or *I will not* (now) *have any other to my Wife, except thee*] they induce preſent *Matrimony* (*h*): But if the words be framed in the Future Tenſe, as [*Non habebo aliam in Uxorem, niſi te, I will not* (viz. hereafter.) *have any other to my Wife, except thee*] hereby Spouſals *de futuro*, and not Matrimony, are induced (*i*); except in certain Caſes, As when the Parties did before entreat of Matrimony to be contracted betwixt them (*k*); or where a Ring was given and received in manner as is accuſtomed at the contracting of Matrimony (*l*), or in ſuch like Caſe (*m*). The Reaſon whereby divers have been drawn into this Opinion, and perſwaded that the words of the Contract, being framed in the Preſent Tenſe, Matrimo-

(*h*) Specul. in Rub. de Sponſal. extra n. 5. Anto. de Butr. in c. ex parte. de Sponſal extra. Jo. Brun. in tract. de Sponſal. concl. 13. Jaſ. in L. actione C. de tranſac. n. 4. (*i*) Anto de Butr. in d. c. ex parte. Alciat. in L. actione C. de tranſac. n. 28. & Molin. in ad-

dit. ad Dec. in eund. L. (*k*) Specul. in Rub. de Sponſal. n. 3. verb. ſecus autem Cæpol. conſil. 1. col. pen. in civilibus dec. in L. actione C. de tranſac. n. 7. Pacianus Tract. de probac. Lib. 1. c. 35. n. 66. verſ. mihi. (*l*) Menoch. Tract. de præſump. lib. 3. præſump. 3. n. 8. Cæpol. d. conſil. 1. (*m*) *Nempe quibus verbis quæ alias inſpectâ ſuâ naturâ non niſi Sponſalia denotant, adhibitis quibuſdam Circumſtantijs inducunt Matrimonium, id quod non raro contingit, ut proximè tradidimus in ſuperioribus Paragraphis.*

ny;

ny; and being framed in the Future Tenſe, Spouſals only are induced, is this; The word [*niſi*] ſay they, following a Negative Propoſition, although it have the force of an Affirmative (for thus much they willingly confeſs with us (*n*),) yet doth it not affirm any more than is before denied in the Propoſition before going; ſo that if in the former part of the Sentence a preſent Act be denied, in the Exception following a preſent Act is affirmed: But if in the former part of the Sentence a future diſpoſition or ability be denied, in the Exception following no more is affirmed, than future diſpoſition or ability (*o*). And here I confeſs with them that they ſay truly (*p*), ſince the Exception is of the nature of the Rule (*q*): This then being confeſſed on both ſides, namely, That the Exception doth affirm no more than the Propoſition doth deny; they proceed and ſay, That by words of the Preſent Tenſe a preſent Act, and by words of the Future Tenſe a future Diſpoſition or Ability only, is denied in the Negative Propoſition, and conſequently affirmed in the Exception following (*r*). But here we do not altogether agree in every point; for though this may be ſafely yielded unto them, that the words of the Contract being conceived in the Preſent Tenſe, as [*Nolo habere aliam in Uxorem, niſi te, I will not* (now) *have any, except thee*] a preſent Act is here denied in the Propoſition, and ſo a preſent Act affirmed in the Exception (*s*); yet when as they challenge further, That the words of the Contract being framed in the Future Tenſe, a future Diſpoſition or Ability only is underſtood, This is not to be yielded unto them for ſound or certain; ſince it is ſure, that divers words (whereof [*habebo*] I will have, is one) which albeit they be formed in the Future Tenſe, yet nevertheleſs

(*n*) Anto de Butr. in d.c. ex parte. de Sponſal. extra. Cœpol. d. conſil. 1. col. pen. Alciat. in d. l. actione, n. 25.

(*o*) Anto. de Butr. Cœpol. & Alciat. ubi ſupra.

(*p*) Bar. in L. Si eum §. qui injuriarum. ff. Si quis Caution. n. 4. verb. ſed advertend. & ibi Bald. col. pen. verb. reſpondit. & Alex. n. 8. nec contradicit Panor. in d. c. ex parte. de Sponſ. extra. n. 8. vel Præpoſ. eod. c. n. 7.

(*q*) Dec. Cagnol. & Hieron. Franc. in l. 1. de Reg. Jur. ff.

(*r*) Specul. in Rub. de Sponſal. extra. Anto. de Butr. in d. c. ex parte de Sponſ. extra. Cœpol. d. conſil. 1. Adde Prier. verb. Matrimonium 2. q. 10.

(*s*) Præpoſ. in d. c. ex parte n. 8. Bar. Bald. & Alex. in L. Si eum §. qui injuriarum ff. Si quis caution. Silveſt. Prier. verb. matrimonium. 2. q. 19.

have

have the force of the Present Tense (*t*); and though [*non habebo*] signifie [*I will not have hereafter*], yet this [*hereafter*] is not a Year hence, nor a Month, nor a Seven-night, nor a Day, nor an Hour hence, but immediately and presently after the speaking of the words, without any distance or intermission (*u*) at all; like as if the Party had said [*from henceforth, I will not have any other to my Wife, except thee*]; and therefore since the Exception affirmeth no less than was before denied (*x*); It followeth, That by the former words thus much is affirmed, at least in effect, though not in sound, [*from henceforth I will have thee for my Wife*], which words verily induce Matrimony, not Spousals (*y*); and so it is not material whether a Man say [*nolo habere, I will not have*] in the Present Tense, or [*non habebo*], in the Future Tense. And if there were any difference, yet our *Language* considered, these words [*I will* or *I will not*] are no more proper to the Future Tense, than to the Present (*z*); and therefore being indifferent, ought rather to be referred to the Present Tense, in favour of Matrimony (*a*).

(*t*) Supra hoc ipso §. in princ. DD. in c. ex literis el. 1. & in c. ex parte de Sponsal. extra.

(*u*) *ubi enim nullum apponitur tempus, statim debetur.* Panor. in d. c. ex parte n. 8. in fin. §. ult. Institut. deinutil. Stipula. L. cedere diem ff. de verb. signif. & ibi DD.

(*x*) Bar. & alij in L. actionem. C. de transac. Dec. & Cagnol. in l. 1. de Reg. Jur. ff.

(*y*) c. ex parte de Sponsal. extra.

(*z*) *Siquidem* [*volo habere & habebo*] (*attento nostratis linguæ idiomate*) *eisdem prorsus verbis exponuntur*, [I will have] *Silicet* [*nolo habere & non habebo, I will not have*] *sine ullo temporis discrimine.*

(*a*) Menoch. de præsump. lib. 3. præsump. 3. in fin. Lapus Alleg. 56. Præpos. in d. c. ex parte. n. 7. in fin.

29. Thus having surveyed the sundry Opinions and conceits concerning these words [*non habebo aliam in Uxorem, nisi te, I will not have any other to my Wife, except thee*] I rest and stay with the received Opinion (*b*); Concluding, that they import thus much, [*I will have thee to my Wife*]; which Conclusion also (as I take it) hath place, when as the Parties instead of the word [*nisi, except*] do use some other exceptive words, as [*præter,*

(*b*) *Hanc. enim. op. communem esse refert.* Præpos. in c. ex parte de Sponsal. extra quod etiam fatetur Covar. Tract. de Sponsal. 2. parte c. 4. §. 1. n. 6. & Menoch. Tract. de præsump. lib. 3. præsump. 3. n. 8.

quam,

quam, præterquam (c), *beſides, than, but*], ſaying for Example, [*I will have none other to my Wife, except thee*, or *than thee*, or *but thee*]; for hereby alſo is ſignified [*I will have thee to my Wife* (d)]: Which words being mutually uttered by either party, induce Matrimony (e).

(c) de quibus dictionibus Bar. Jaſ. & Alex. in L. Si eum §. qui injuriarum. ff. Si quis caution. & generaliter DD. in L. actione C. de tranſac.

(d) *Saltem attento communi loquendi uſu, cui omnino ſtandum eſt, poſtpoſita verborum proprietate.* Præpoſ. in d. c. ex parte de Sponſ. extra. n. 7. per. c. ex literis el. 1. eod. Tit.

(e) Panor. in c. ex literis el. 1. de Sponſ. extra. & ibi. Præpoſ. & alij & in c. ex parte eod.

30. Now at laſt let us give place to the *Limitations* of the former Rule, which ſaith, That when the Parties do Contract themſelves by words of the *preſent time*, or by words of the *future time*, having relation to the *Execution* or *Subſtance* of Matrimony, Spouſals *de præſenti* (being in ſubſtance Matrimony) are thereby contracted; of which Rule, theſe be the *Limitations* which do now approach, marching one after another.

31. The firſt Limitation is when *Children* are Contracted together by words of preſent time; for albeit they ſay thus, [*I take thee to my Wife, and I take thee to my Husband*]; This by Interpretation of Law is not Matrimony, but Spouſals (f); Albeit, alſo they did thereby intend to contract Matrimony (g). By [*Children*] here I underſtand them which have paſt their Infancy, but have not as yet attained to lawful years for Marriage (h); for during Infancy neither Matrimony nor Spouſals can be contracted (i).

(f) c. unic. §. 1. de deſponſ. impub. lib. 6.

(g) d. §. 1. cum Gloſſ. ibidem. *contra antiquam quorund. opinionem, de quibus* Henr. Boic. in c. à nobis de deſponſ. impub. extra. & Hoſtienſ. Summa Tit. de deſponſ. impub. §. & quæ Sponſalia.

(h) vide ſupra. §. 7.

(i) c. 1. de deſponſ. impub. in Sext. L. in ſponſal. el. 2. ff. de Sponſal.

32. The ſecond Limitation is when the one Party is of full Age, and the other a Child, which are contracted together by words of the preſent time, for this Contract

Contract is not Matrimony, but only Spousals *de futuro* as if they were both Children (*k*).

33. The third Limitation is, when these words of the present time are uttered in *Jeast* or *Sport*, for such wanton words are not at all obligatory in so serious a matter as is Matrimony (*l*).

34. The fourth Limitation is, when the words be meer negative: As [*I will not have any other Woman to my Wife,*] and [*I will not have any other Man to my Husband,*] or [*I will never forsake thee,*] or [*I will never fail thee* (*m*);] for neither *Spousals*, neither *Matrimony*, are hereby induced.

35. The fifth Limitation is, whereas the words be so *general* and *uncertain* that the meaning of the Parties cannot appear: For Example, these words; [*Do tibi fidem* (*n*), *I give thee my Faith,*] *Nunquam tibi deficiam* (*o*)] *I will never fail thee,*] *Quo animo es? Vis me habere?*] *What chear? Wilt thou have me* (*p*)?] Or thus, [*If ever I marry, I will marry thee* (*q*),] with a hundred such like Instances standing afar off, and hanging *in nubibus*, which infer neither Matrimony nor Spousals, without special Circumstances, whereby it may be known, that the Parties did thereby mean and intend to contract Matrimony or Spousals (*r*).

(*k*) d. c. unic. §. 1. de desponſ. impub. in Sext. & supra §. 6.

(*l*) Jo. And. in c. fin. de desponſ. impub. Repertorium Nic. Milis verb. Matrimonium L. Obligationis substantia ff. de action. & oblig. & l. illud ff. de jure jur. *allegantis tamen locum incumbit probatio, aliter non præsumitur, sed in dubio pro Matrimonio judicabitur*, Lib. 2. consil. matrimonial. consil. ibidem 34. n. 11.

(*m*) Covar. Tract. de Sponsal. secunda parte, c. 4. §. 1. n. 3. in fin. & n. 7. in princ.

Angel. de clavasio. verb. Matrimonium el. 2. n. 12. in fin. Summa Silvestrin. verb. matrim. 2. q. 13. Summa Rosella. verb. matrim. §. 5. versic. quid si dicat. (*n*) Lib. 1. consil. matrimonial. consil. ibidem 5. n. 8. (*o*) Silvest. Prior. verb. Matrim. 2. q. 13. (*p*) lib. 2. consil. matrim. consil. ibidem 5. n. 8. (*q*) lib. 2. consil. matr. consil. ibidem 14. in princ. & consil. 5. n. 1. (*r*) lib. 1. consil. matr. consil. ibidem 60. n. 16. Henr. Boic. in c. Attestationes. de desponſ. impub. extra. paulò ante finem.

36. The sixth Limitation (not unlike the former) is, when the Parties do use these or such like words [*Bibo tibi nomine Matrimonij* (*s*), *I drink to thee in token of*

(*s*) Præpos. in c. ex parte de Sponsal. extra. n. 8. *qui dicit ibi non induci Matrimonium, nisi consuetudo (inquit) interpretatur, quod* [Hoc bibere] *inducat Matrimonium.*

Marriage,] and thereupon both of them drink; by this alone Matrimony is not contracted (*t*).

37. The ſeventh Limitation is, when the one Party doth promiſe ſimply, the other conditionally: For Example; the Man ſaith [*I take thee to my Wife*,] the Woman anſwereth [*I take thee to my Husband, if my Father conſent*;] this is a void Contract (*u*), unleſs the Condition were *impoſſible* or *unhoneſt*; for then it is otherwiſe (*x*), as appeareth in the next Paragraph.

38. The eighth Limitation is, when the one Party doth promiſe under one Condition, and the other Party under another Condition. For Example; the Man ſaith, *I take thee to my Wife, if my Father conſent*,] and the Woman ſaith, [*I take thee to my Husband, if thou wilt give me* 100 *l.*] Here is neither Matrimony nor Spouſals, but a void Contract (*y*).

39. The ninth Limitation is, when the one Party doth anſwer with ſome *further quality* or *addition* impertinent to the Queſtion. As for Example; the Man ſaith, [*Vis eſſe Uxor mea? Wilt thou be my Wife?*] The Woman anſwereth, [*Volo, & quicquid vis, I will, and whatſoever thou wilt beſides*;] for hereby neither Matrimony nor Spouſals is contracted (*z*).

40. The tenth Limitation is, when the words ſignifying the *Eſſence* or *Execution* of Marriage, and being conceived in the Future Tenſe, do follow other words which naturally or properly import no more but Spouſals *de futuro*; as [*I will marry thee, and I will hold thee for my Wife* (*a*);] for howſoever theſe words [*I will hold thee for my Wife*] being uttered alone induce Matrimo-

(*t*) Vide Præpoſ. ubi ſupra. & Henr. Boic. in c. Atteſtationes. de deſponſ. impub. extra. *qui hoc dictum ibidem limitant.*

(*u*) L. 1. §. Si quis ſimpliciter ff. de verb. oblig. Covar. Tract. de Sponſal. ſecunda parte, c. 3. §. 1. n. 11.

(*x*) DD. in c. fin. de cond. app. extra. & in Anth. ſi ingreſſi. de Sanct. Eccleſiis C.

(*y*) Imol. Roman. Zaſ. & Molin. in l. 1. §. ſi quis ſimpliciter. ff. de verb. oblig.

(*z*) Lib. 1. conſil. matrimonial. conſil. ibidem 60. n. 16. poſt Rom. in Rub. de Arbitr.

(*a*) Panor. in c. ex parte. de Sponſal. extra. n. 7. in fin. Specul. in Rub. de Sponſal. n. 7. Menoch. de præſump. lib. 3. præſump. 3. n. 4.

ny

ny (*b*); yet following other words of another nature, they are deprived of their own proper virtue, and as Acceſſory they undergo the nature of the Principal (*c*).

41. The eleventh Limitation is, when the Parties do promiſe that they will contract Spouſals together, for as yet Spouſals are not contracted (*d*): And as he which promiſeth that he will acquit, hath not yet acquitted (*e*); ſo they which promiſe that they will contract Spouſals, have not as yet contracted, howbeit the Parties are bound in this Caſe to accompliſh their Promiſes (*f*), otherwiſe they are puniſhable for not performing the ſame (*g*).

(*b*) c. ex parte. de Sponſal. extra. & ibi Panor. & Præpoſ.

(*c*) Arg. L. ultim. §. cui dulcia ff. de vino tritic. vel ol. leg. Menoch. de præſump. lib. 3. præſump. 3. n. 4.

(*d*) Repertor. Nic. de Milis, verb. Sponſalia.

(*e*) Boer. deciſ. 3. in princ. Tiraquel. de Retract. Conventional. ad finem Tituli. n. 52. fol. (lib. mei) 380.

(*f*) Covar. Tract. de Sponſal. prima parte, c. 4. in princ.

(*g*) c. 1. de Sponſ. duorum extra. Melchior Kling. Tract. de cauſ. matrimonial. fol. 5.

42. The twelfth Limitation is, when the Promiſe is not mutual: For Example; the Man ſaith to the Woman [*I take thee to my Wife,*] but the Woman doth not make the like Promiſe to the Man; or contrariwiſe, ſhe doth promiſe Matrimony, but not he: This being a lame or halting Contract, is not of any force (*h*).

(*h*) Præpoſ. in c. 1. de Sponſ. duorum extra. lib. 1. conſil. matr. conſil. ibidem 84. n. 4. & lib. 2. conſil. 4. n. 1. & conſil. 5. n. 1. in fin.

43. The thirteenth Limitation is, when there is ſome lawful impediment, wherefore the Parties cannot be married together, of the which we ſhall entreat hereafter (*i*).

(*i*) infra.

44. The fourteenth Limitation is, when as the Contract being made by words of the Future time ſounding of the *Execution* of Marriage; as [*I will have thee for my Wife,* and *I will have thee for my Husband,*] the Parties do afterwards marry elſewhere, conſummating the ſame by *Carnal* Copulation, for then by the Opinion of divers, the ſecond Marriage holdeth (*k*), unleſs

(*k*) Covar. de Sponſal. ſecunda parte, c. 4. §. 1. n. 5. Molin. in addic. ad Dec. in c. Juravit. de probat. extra.

the words be very pregnant, having ſome further addition, as [*I will from henceforth have thee, &c.*(*l*)]

45. Finally, Albeit they which do Contract Spouſals *de præſenti*, be very Husband and Wife, in reſpect of the Knot or Bond of Matrimony, ſo that it is not lawful for either of them to marry elſewhere, ſo long as they now live together (*m*); yet do not theſe Spouſals produce all the ſame effects here in *England* (*n*), which Matrimony ſolemnized in the face of the Church doth, whether we reſpect the Legitimation of their Children, or the Property which the Husband hath in the Wife's Goods, or the Dower which ſhe is to have in his Lands (*o*); of which Effects we ſhall have better opportunity to deliver our mind hereafter (*p*).

(*l*) Marti. in addic. ad Hoſtienſ. Tit. de Sponſal. §. quot ſunt ſpecies.

(*m*) c. Conjunx. c. cum initiatur 27. q. 2. c. ſi inter de Sponſal. extra. & ibi DD. Panor. & Felin. in Rub. de Sponſal. extra. Hiero. Schurff. inter conſil. matr. lib. 2. conſil. ibidem 24. n. 2. Melchior Kling. Tract. de Cauſis Matrimonial. fol. 7. Schneidwin. Tract. de Nuptiis, fol. 18. n. 4. Covar. Tract. de Sponſal. ſecunda parte, c. 7. in princ.

(*n*) Perkins Tit. Feoffments fol. 40.

(*o*) Perkins ubi ſupra. Cui velim adjungas Rebuff. in L. pronunciatum §. matrem familias ff. de Verb. Signif. & Covar. Tract. de Sponſal. ſecunda parte, c. 7. §. 1. & §. 4.

(*p*) Infra eadem parte, §. 17.

SECT.

SECT. XII.

Of the Form or Manner of Contracting Simple and Conditional Contracts, and those also which be referred to a Day.

1. SEcondly, Spousals be either *pure* and *simple*, or referred *to a day*, or *Conditional* (*a*). Pure and simple Spousals are so called when as the Parties do absolutely promise Marriage each to other without interposition either of Condition, or delay of Time (*b*), so that both Obligation and Action is thereupon forthwith engendred and born, whereby the Parties are immediately bound and linked together, and are also compellable to solemnize and consummate the promised Matrimony accordingly, at the instance of either of them (*c*), unless the Party convented shew lawful Cause to the contrary (*d*).

2. Concerning the Forms of these pure and simple Spousals, and how they are contracted is particularly described in the two former Paragraphs (*e*), their sundry effects also do more plainly appear in a more convenient place (*f*), and thither I refer thee.

(*a*) §. omnis. Institut. de verb. oblig. Lancel. Institut. jur. can. lib. 2. tit. de Sponsal. c. sicut de Sponsal. extra. & ibi Panor. Summa Hostiens. tit. de condic. oppos. extra.

(*b*) Schneidwin. Tract. de Nupt. fol. 26. n. 33. Panor in c. super eo de cond. appos. de §. omnis Institut. de verb. ob. facit l. cedere diem. ff. de Verb. Signif. & Lancel. ubi supra. (*c*) Schneidwin. ubi supra. Panor. in d. c. super eo. Covar. Tract. de Sponsal. secunda parte, c. 3. n. 2. (*d*) Lancel. Instit. Jur. Canon. Lib. 2. Tit. de Sponsal. & infra §. . . (*e*) Supra §. 10. & §. 11. (*f*) Infra §. 17.

3. Spou-

3. Spouſals referred to a day are ſo termed, when as the Parties do refer the Contract or Marriage to a future time, without mention of any Condition (*g*); For Example, the Man ſaying to the Woman [*I do promiſe thee to Marry thee at* Whitſuntide *next*]; and ſhe anſwering, and [*I promiſe to Marry thee then*, &c. (*h*)]; Concerning theſe kind of Spouſals, two Rules are to be remembred.

(*g*) c. ſicut de Sponſal. extra. §. omnis Inſtitut. de verb. oblig. L. obligationum. §. 1. de action. & oblig & L. cedere de verb. Sig. ff. & ibi DD.

(*h*) DD. in d. c. ſicut. Lancel. lib. 2. Inſtitut. jur. Can. Tit. de Sponſal.

4. The firſt is, that the one Party cannot effectually convent the other for Marriage, until the time prefixed be expired (*i*); Inſomuch that if the Parties do covenant to be Marryed together within a certain time, as within a Month, or within a Year; Yet until that Month, or that Year be expired, the one Party cannot effectually convent the other (*k*), much leſs when they promiſe to Marry together after ſuch a time, can any Action be maintained in the mean time (*l*).

(*i*) L. cedere ff. de verb. Sig. §. omnis Inſtitut. de verb. oblig. *Hinc eſt, quod vulgò circumfertur. Anno ſi debes in fine teneberis anni, Annua ſi debes, hinc inſpicitur caput anni.*

(*k*) L. qui hoc anno ff. de verb. Oblig. §. pen. Inſtitut. de mutil. Stipul. (*l*) *Nam in Stipulatione ex die, Actio interim non oritur, ſi Ripæ credamus*, in L. ita Stipulatus. ff. de verb. oblig. n. 84.

5. The other Rule is, that if he or ſhe do not let or hinder the Marriage at or within the time appointed; the ſame time being paſt, he or ſhe by whom it doth not ſtand, and wherefore the promiſe was not accompliſhed, is from thence at liberty to marry elſewhere, as freely as if the former Spouſals had not been (*m*).

(*m*) c. ſicut. de Sponſal. extra. ibi. nec. per eum ſtetit, &c. Covar. tract. de Sponſ. infra parte. c. 5. n. 8.

6. Againſt which Concluſion there be divers ſtrong Objections (*n*), but this eſpecially; *Say that I do Covenant to pay unto thee* x l. *at or before the Calends of the next Month, at which time I am ready to pay the Mony, and do indeed tender it accordingly, but thou canſt not,*

(*n*) Gloſſ. & DD. in. d. c. ſicut.

not, or wilſt not receive it: Albeit in this Caſe it doth not ſtand by me, wherefore I do not pay the Mony at the time appointed, and ſo do not incur the penalty in that reſpect, Yet I am not hereby acquitted from payment of the principal (*o*): And the reaſon is, becauſe when I promiſe to pay ſuch a Sum at ſuch a time, I promiſe two things, (th' one the payment of the Mony, the other at the time appointed (*p*)); And ſo though I have ſatisfied my promiſe in reſpect of the time, yet have I not performed my promiſe in reſpect of the Sum; and in this reſpect I am ſtill ſubject to be ſued for the principal, notwithſtanding the lapſe of the time preſcribed (*q*): Even ſo where the Man ſaith to the Woman, or ſhe to him, [*I will Marry thee at or before ſuch a day*], here two things be promiſed (*r*), namely Marriage reſembling the *Subſtance* of the promiſe (*s*); and time (being as it were an *accident* or *quality* of that Subſtance) (*t*); And therefore although this be lapſed, yet doth the other remain ſtill to be accompliſhed. This is that ſtrong Objection, in the anſwering whereof, if we ſhould behold the manifold and intricate Solutions of the Writers (*u*), wherein, whilſt they ſtrive amongſt themſelves by contradicting one another, each of them doth ſeem to overturn his fellow, and all of them to tumble together by the Ears (*x*), the Sight of this their Tumult would be much more wonderful, than the rehearſing their ſeveral Aſſertions and Arguments could be profi-

(*o*) L. Celſus ff. de recep. Arbitr. §. 1. cum Gloſſ. ibidem.

(*p*) d. L. celſus. §. 1. & ibidem Bar. & Baldus.

(*q*) d. l. Celſus Card. & Panor. in d. c. ſicut.

(*r*) Arg. d. l. Celſus §. 1. & c. cum dilecti. de dolo & cont. extra.

(*s*) *Eſt enim receptior opinio, factâ in diem obligatione, & obligationem, & actionem ſtatim ortam eſſe, ſed obſtare exceptionem, ne ante diem petatur.* Alciat. in L. cedere ff. de verb. Sig. n. 10. *Immo idem viris eſt, etiamſi Stipulatio fiat ex die*, & eſt com. op. teſte.

Graff. Theſaur. com. op. §. legatum q. 43. n. 5. quicquid in Contrarium ſtatuat Ripa. in L. ita Stipulatus. de verb. oblig. (*t*) *Sanè nemo neſcit, quòd tempus non eſt modus vel inducendæ, vel tollendæ obligationis* L. obligationem fere. §. placet ff. Card. in d. c ſicut. op. infra. (*u*) Gloſſ. in d. c. ſicut. *quæ tripliciter ſolvit, aliter tamen ſolvit.* Jo. And. aliter Hoſtienſ. aliter Card. aliter Anto. de Butr. Panor. Præpoſ. & aliter Henr. Boic. (*x*) *Truffas eſſe ſolutiones gloſſæ dicit* Anto. *ipſum tamen, inmentem gloſſæ reincidere teſtatur* Præpoſ. Panor. autem varia de hac q. ſcribi per. DD. refert, *cui etiam ſolutiones gloſſæ non admodum placent, ut quæ non funditus objectionem tollunt, nec conveniunt inter ſe legiſtæ in* L. *qui hoc anno.* ff. de verb. oblig. *præ cæteris autem Bartolum venenatis dentibus acriter mordet.* Zaſius in d. l.

table,

table, as tending rather to breed confuſion than bring inſtruction (*y*): Wherefore I think it meet, out of theſe their troubleſom Contentions, to pick out ſome of the eaſieſt and ſoundeſt Diſtinctions, wherewith this hard and difficult Knot may be untyed: Underſtand therefore that in Contracts and Bonds the time is ſometimes ſet down to *ſollicite* the performance or accompliſhment thereof, and ſometimes to *limit* and *determine* the ſame (*z*); In the former caſe the lapſe of time doth not work any diſſolution of the Contract, or deliverance of the Parties: In the ſecond caſe it doth (*a*); Now if we would know whether the time be ſet down to *ſollicite* the performance of any Contract, or to *extinguiſh* and *determine* the ſame, we have two notable Precepts delivered to that end (*b*); The firſt Precept is this; When the time is appointed in reſpect of ſome thing to be performed by one of the Parties alone, then it is deemed to be ſet down to *ſollicite* the performance of the Covenant or Bond (*c*); ſuch is the caſe objected, where one Party alone is to pay the Money; and therefore the Principal Debt is not extinguiſhed by the only lapſe of time, howſoever the Party were then ready to have fully ſatisfied, whatſoever was by him to have been performed at the time preſcribed (*d*); But when the time is appointed in reſpect of ſome things to be *mutually* performed by both Parties (as in our Caſe,) then is it deemed to be ſet down to *finiſh* and *determine* the Covenant and Bond (*e*); and therefore the one Party failing, in performing the Covenants at the time preſcribed, the other Party by whom it did not ſtand, is thereby ſet at liberty as ſoon as the time of the accompliſhment is paſt (*f*); for when any Man promiſeth that he will marry ſuch a Woman at ſuch a time, It is intended that he doth ſo promiſe, with this ſecret Condition, *viz.* if ſhe will then alſo marry him; otherwiſe

(*y*) *Qui nimium emungit, elicit ſanguinem, & nimia altercatione amittitur ſæpe veritas.*

(*z*) Panor. poſt. Gof. & Anto de Butr. in c. ſicut de Sponſal. extra. Covar. Tract. de Sponſal. infra. parte c. 5. n. 8. verb. Secundo.

(*a*) Anto. Panor. & Covar. ubi ſupra.

(*b*) Anto. de Butr. in d. c. ſicut, & poſt eum Panor. eod. c. n. 11. & Præpoſ. n. 7.

(*c*) Anto. Panor. & Præpoſ. ubi ſupra. Lancel. lib. 2. Inſtitut. Jur. Can. Tit. de Sponſal.

(*d*) L. Celſus. §. 1. ff. de arbitr. & ibi Bart. & Bald.

(*e*) Panor. in d. c. ſicut poſt. Anto.

(*f*) c. ſicut de Sponſal. extra.

otherwiſe not (*g*). The other Precept is this, Sometimes the time is ſet down to ſollicite the accompliſhment of a *perfect Contract*, and then the Bond is not diſſolved by the only lapſe of time (*h*). Sometimes again it is ſet down to ſollicite the *beginning* of a new Contract, to be made betwixt the Parties; and then it is diſſolved by lapſe of time (*i*); for thereby either Party doth ſhew his unwillingneſs to proceed to the effecting of this imperfect Contract (*k*). Now in our Caſe the Parties did not firſt Contract *pure* and *ſimple* Spouſals, and afterwards appoint a time for Solemnization of the Marriage; for then, the Contract being firſt perfect, had not been diſſolved by lapſe of time agreed on afterwards (*l*); but even at the very firſt, the time was concluded upon, and ſet down by both Parties, whereunto they referred the future Marriage, no perfect Contract going before; and therefore, by voluntary ſuffering the time to ſlide, without any offer of performance by either Party, the Spouſals are diſſolved (*m*). And this I take to be the plaineſt and ſureſt Anſwer to the former Objection. But what if it doth not ſtand, either by the Man or by the Woman, wherefore they were not married at the time appointed, being hindred by ſome *caſual* means, or by ſome *third perſon*, whether in this Caſe be the Spouſals diſſolved (*n*)? I ſuppoſe not (*o*); and that if either he or ſhe marry elſewhere they are to be puniſhed, howſoever the time prefixed be determined (*p*); for though the impediment do excuſe from puniſhment, for not marrying at the appointed time, yet doth it not

(*g*) Cardinal. Panor. Præpoſ. & DD. in d. c. ſicut. Covar. Tract. de Sponſal. prima parte, c. 5. n. 8. *quem, ſi videbitur legito.* facit L. cum quid ff. ſi certum pet. L. Triticum. de verb. oblig. ff.

(*h*) L. cedere diem. ff. de Verb. Signif. & ibi Alciatus. n. 10. Anto. de Butr. & Panor. in d. c. ſicut & ibidem Præpoſ.

(*i*) Panor. in d. c. ſicut. in fin. & Præpoſ. ibidem poſt Anto. de Butr. Lancel. lib. 2. Inſtit. Jur. Can. Tit. de Sponſal.

(*k*) Panor. ubi ſupra.

(*l*) & ita conſuluit Panor. ut ipſe refert in fin. d. c. ſicut. & conſentit Covar. Tract. de Sponſal. prima parte, c. 5. n. 8. in fin.

(*m*) Dom. Anton. in d. c. ſicut. & ibi Panor. *qui hanc ſecundam Theoricam tanquam clariorem, & veritati magis amicam laudat.* Covar. Tract. de Sponſal. prima parte, c. 5. n. 8.

(*n*) de hac q. Anto. de Butr. in d. c. ſicut. & ibi Jo. And. & Præpoſ. n. 7. in fin.

(*o*) Cardinal. Henr. Boic. & Præpoſ. in d. c. ſicut.

(*p*) Præpoſ. & Boic. ubi ſupra.

not diſſolve the Covenant (*q*); wherefore the impediment ceaſing, they are to marry as ſoon as conveniently they may (*r*), unleſs ſome other cauſe, beſide the former impediment, or lapſe of time, do withſtand the ſame (*s*). And here note, That if the Parties do promiſe to marry together in ſuch a Month, or at ſuch a Feaſt, as [in the Month of *May*, or at the Feaſt of St. *George*, without ſaying next,] it is to be underſtood of the next Month of *May*, or at the next Feaſt of St. *George*, unleſs the contrary do appear (*t*).

(*q*) Cardinal & Præpoſ. ubi ſupra. & facit L. quæſitum ff. de Reg. Jud.

(*r*) Præpoſ. in d. c. ſicut. n. 7. in fin. accedit c. cum dilecti. de dolo & contumac. extra nec longè abeſt Archi. in c. nupti. 27. q. 1.

(*s*) *veluti ſi cum aliâ perſona per verba de præſenti contraxerit d. c. ſicut.*

(*t*) L. eum qui Calendis. ff. de verb. oblig.

7. Conditional Spouſals are they which be neither ſimple, nor referred to a certain day, but whereunto ſome quality is annexed, or wherein ſome event is expreſſed, whereby the force or effect (*u*) of the Contract is *ſuſpended* (*x*). For Example; [*I will take thee to my Wife if thou wilt give me* 100 l. (*y*),] or [*I do take thee to my Wife if my Father ſhall conſent*, &c. (*z*)] By which Examples we may perceive, That not only Spouſals *de futuro*, but Spouſals *de præſenti* may be contracted conditionally (*a*); and although in the later Caſe the words be of the preſent time, yet have they not their effect preſently, nor before the event of the Condition (*b*).

(*u*) i. e. *obligatio & actio ſuſpenduntur* L. cedere diem. ff. de Verb. Sign. & ibi Iciat. Rebuff. & alii.

(*x*) Schneidwin. Tract. de Nup. tiis, fol. 27. n. 34.

(*y*) c. de illis de Condic. appoſ. extra. (*z*) c. ſuper eo. de Condic. appoſ. extra. (*a*) Panor. in d. c. ſuper eo. n. 5. & in d. c. de illis n. 2. (*b*) Panor. in d. c. ſuper. n. 5. & ibi Præpoſ. n. 2. Schneidwin. Tract. de Nup. fol. 27. n. 34. Covar. Tract. de Sponſal. ſecunda parte. c. 3. n. 2. lib. 1. conſil. matrim. conſil. ibidem 64. n. 9.

8. Yet do not all manner of Conditions ſuſpend the Contract, or enforce an expectation of the event thereof (*c*); for in ſome Caſes the conditional Contract is reputed ſimple, and hath its preſent force, as if no Condition had been expreſſed; and in ſome Caſes the Condition doth utterly deſtroy the Contract (*d*): Wherefore

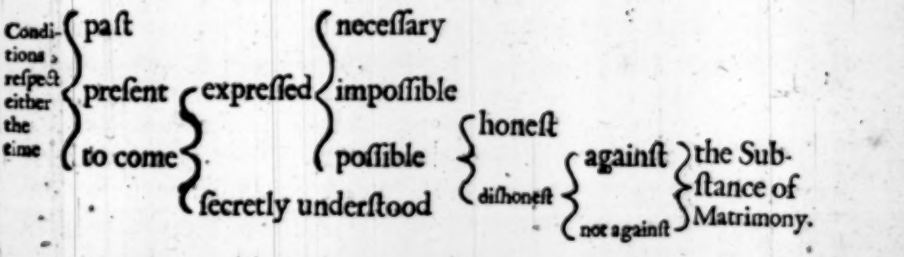
(*c*) ut infra hoc ipſo §.

(*d*) Henr. Boic. in c. ſi Conditiones, de condit. appoſ. extra. Summa Hoſtienſ. in Rub. de Condic. appoſ. extra. §. quæ conditio. Covar. Tract. de Sponſal. ſecunda parte, Paragraphis 1, 2, 3.

that

that we may know when the event of the Condition is to be expected, when not; and likewiſe when the Condition doth deſtroy the Contract, when not; we muſt obſerve theſe Diſtinctions. Conditions therefore, are either of that which is paſt, or preſent, or to come: Conditions of future things be either ſecretly underſtood, or expreſſed; the expreſſed are either neceſſary, impoſſible, or poſſible; poſſible be either honeſt, or unhoneſt; unhoneſt Conditions are either againſt the *Subſtance* of Matrimony, or not (*e*): As in this little Table which I have made for the help of thy Memory is deſcribed.

(*e*) *Hæc & alias Conditionum Species videre eſt apud* Summam Hoſtienſ. in Rub. de Sponſal. extra. *qui triplicem ibidem diviſionem conſtituit, primam autem Conditionum diviſio hæc eſt. Alia (inquit) eſt tacita, alia expreſſa. Alia de præſenti, alia de præterito, alia de futuro; & hæc eſt aut poſſibilis, aut impoſſibilis; impoſſibilis rurſus duplex, de jure (quæ & turpis dicitur) & de Facto. Secunda vero diviſio eſt poſſibilium, quæ ſunt vel poteſtativæ, vel caſuales, vel mixtæ. Tertia denique (quam tradit) diviſio eſt, hujuſmodi Conditio vel eſt honeſta & poſſibilis, vel inhoneſta & impoſſibilis; vel honeſta & impoſſibilis; vel inhoneſta & poſſibilis; quæ omnes ſi videbitur ibi perluſtrare poteris. Et quidem hanc tertiam* Hoſtienſ. *diviſionem DD. fere omnes proſequuntur, ubicunque de quæſtione his propoſitâ agitur, ut* Henr. Boic. in c. ſi Conditiones, de Condic. app. extra. Melchior Kling. Tract. de Cauſis Matrimonial. fol. 73. cum ſeq. Schneidwin. de Nuptiis, fol. 27, 28. Covar. Tract. de Sponſal. ſecunda parte, c. 3. *& nonnulli alii, Ego autem hanc noſtram diviſionem & magis perſpicuam, & veritati magis amicam ſuſpicor: Sed ſuum cuique pulchrum, quantumvis non formoſum.*



9. Conditions referred to that which is *paſt* or *preſent*, do not ſuſpend the validity, nor defer the effect of the Contract, but do preſently either confirm or

make void the ſame (*f*). For Example, [*I will have thee to my Wife if my Father be living, or were alive within this Month, &c.*] The Father being alive at the time contained in the Condition, the Contract is preſently good, otherwiſe being dead, the Contract is preſently void (*g*): wherefore theſe kind of Conditions, which be referred to the time *paſt* or *preſent*, are improperly called Conditions (*h*).

(*f*) L. Inſtitut. talis ff. de condic. & inſtitut. L. cum ad præſens ff. ſi cert. pet. Jaſ. & Dec. in eand. L. cum ad præſens.

(*g*) d. L. Inſtitut. & ibi DD. Henric. Boic. in L. ſi conditione de condic. appoſ. extra. Hoſtienſ. Summa eod. Tit. § quot Species. Inſtitut. § pen. de verb. ob.

(*h*) Covar. Tract. de Sponſal. ſecunda parte, c. 3. §. 1. n. 9. per d. L. Inſtitut. ff. de condic. & Inſtitut. in fin. § pen. Inſtitut. de verb. oblig.

10. Secret Conditions are theſe, and ſuch like; [*Si Deus voluerit, If God will; Si vixero, If I ſhall ſhall live; Si potero, If I ſhall be able* (*i*);] and they be called Secret Conditions, becauſe they are evermore *ſecretly* intended, though they be not expreſſed (*k*); and therefore when the Parties do contract Matrimony or Spouſals together in this manner, [*I do take thee to my Wife, I will take thee to my Wife*;] and ſhe likewiſe, [*I do take*, or *I will take thee to my Husband*,] without expreſſing any Condition, nevertheleſs theſe aforeſaid Conditions, [*If God will, If I live, If I may by Law, &c.*] are always ſecretly underſtood, and yet nevertheleſs they do not make the Contract conditional, nor ſuſpend the force or effect thereof (*l*), which Concluſion is undoubtedly true; whereas theſe Conditions are not expreſſed, but underſtood (*m*). Indeed if the Parties ſhall expreſs theſe Conditions in their Contracts, then it is not without queſtion, whether the Contract be Simple or Conditional (*n*); wherein whether Opinion is to be preferred, ſhall be ſatisfied (God willing) e're long (*o*).

(*i*) Epiſtol. Jacc. 4. §. 15. gloſſ. & DD. in c. unic. §. ultim. de Sponſal. lib. 6.

(*k*) Archi. in c. unic. de Sponſal. in Sext. in fin. vide Jo. Olden. Topic. legal. *loco ab auctoritate, ſeu prejudic. ubi enumerat xx. tacitarum Conditionum exempla.*

(*l*) Innoc. in c. debitores. extra. de Jure Jur. Olden. ubi ſupra. Melchior Kling. de cauſis matrimonial. fol. 74. Henr. Boic. in c. ſi Conditiones. de cond. app. extra.

(*m*) Archid. in d. c. 1. de Sponſal. lib. 6. n. 12. Henr. Boic. ubi ſupra. Summa Roſell. verb. matrimonium. 5. in princ.

(*n*) *Id quod manifeſtum eſt per* Gloſſ. & DD. in c. unic. § ultim. de Sponſal. in Sext. Silveſt. verb. matrimonium 8. q. 14. verb. Septim. & per Covar. Tract. de Sponſal. ſecunda parte, c. 3. §. 2. n. 4.

(*o*) Infra hoc §. paulò poſt.

11. By

11. By neceſſary Conditions, I mean thoſe whereof there is an infallible natural Cauſe, by force whereof the Effect muſt needs follow (*p*): and theſe Conditions do not ſuſpend the Contract, nor make the ſame Conditional (*q*); and therefore if the Parties do mutually promiſe Matrimony, [*If the Sun ſhall riſe to morrow*] it is as if they had *ſimply* promiſed (*r*). But if the words of the Contract be referred to the time of the event of the Condition, then is the Contract Conditional, and the virtue thereof in ſuſpence until the Event do come, notwithſtanding that the ſame be inevitable; as when the Contract is made thus, [*If, and when the Sun ſhall enter into* Libra, *&c.* (*s*)] or thus, [*If, and when my Father ſhall dye* (*t*)]; and ſo it is in caſe the Event be certain; but not by reaſon of any natural Cauſe, as [*If Antichriſt ſhall be born* (*u*):] If the Condition be conceived Negatively, under an *impoſſible* Condition, as [*If thou ſhalt not touch the Skies with thy Finger*;] it is in effect as if the Parties had contracted ſimply without any Condition (*x*): The Reaſon is, whereſoever the Affirmative is *impoſſible*, there the Negative is *neceſſary* (*y*).

(*p*) Sichard. in Rub. de Inſtitut. & ſub. C. n. 7.

(*q*) Henr. Boic. in c. ſi Conditiones. de condic. appoſ. extra. Summa Hoſtienſ. eod. Tit. §. quæ condic. verb. *Quid ſi Contrahо.*

(*r*) Melchior. Kling. Tract. de cauſ. matrimonial. fol. 73. Cardinal Hoſtienſ. Panor. & Præpoſ. in c. per tuas de condic. appoſ. extra.

(*s*) Henr. Boic. in c. ſi Conditiones. de condic. appoſ. extra. Covar. Tract. de Sponſ. ſecunda parte. c. 3. §. 2. n. 11. *& in hoc caſu locum habet* Gloſſ. in d. c. per tuas, quam ſequuntur Jo. And. & Dom. Anto.

(*t*) Jaſ. in l. impoſſibilis. ff. de verb. oblig. in fin. *quem citat* Covar. Tract. de Sponſal. *verum dies iſtius Conditionis* (*ſi* Titius *moriatur*) *eſt incerta non ſolum* quando, *ſed etiam* an *ſit extitura. Quum* Titius *poteſt non mori, dum vivant contrahentes, Quid ſi dies ſit incerta an & quando ſit ventura, Contractus eſt Conditionalis, Id quod fatetur* Cardinal. in d. c. per tuas de cond. app. in fin.

(*u*) Covar. Tract. de Sponſal. ſecunda parte, c. 3. §. 2. n. 11. in fin. poſt Adrian. q. 17. de matrim.

(*x*) Minſing. in §. ſi impoſſibilis. Inſtit. de inutil. Stipul. n. 8.

(*y*) Bar. in l. impoſſibilis. ff. de verb. ob. & Minſing. ubi ſupra.

12. Impoſſible Conditions (in this place) are they whereunto Nature is an impediment, that they cannot be accompliſhed; as [*If thou ſhalt touch the Skies with thy Finger*; *If thou ſhalt drink up all the Water in the Sea, &c.* (*z*)]. Theſe Conditions are in favour of Matrimony

(*z*) §. impoſſibilis. Inſtit. de inutilibus Stipulac. Minſing. in §. impoſſibilis. Inſtit. de hæred. inſtituend. n. 3.

mony, utterly rejected and void, or as if they were not at all mentioned (*a*), and ſo the Contract qualified therewith is nevertheleſs reputed pure and ſimple (*b*), which Concluſion is very true, the impoſſibility being naturally perpetual: But if the impoſſibility were not ever from the beginning, but did ariſe in proceſs of time by ſome accident, then is not the Condition void, but maketh void the Contract; as when the Man and the Woman do Contract Spouſals or Matrimony together conditionally, [*If their Parents ſhall conſent,*] their Parents being already dead, and ſo impoſſible that they ſhould give any Conſent thereunto; for in this Caſe the Contract is void, notwithſtanding the impoſſibility of the Condition (*c*); which thing is the rather received, as more agreeable to the Truth, whereas the Parties were then ignorant of the death of their Parents at the time of the Contract (*d*); for where the Parties are perſwaded that the Condition is poſſible, although in truth the ſame be naturally and perpetually impoſſible, yet is it not rejected, but doth make void the Contract wherewith it is qualified (*e*); and therefore if the Parties, being perſwaded that the Stars of Heaven do ſometimes fall down to the Earth, and there melt away, do Contract Matrimony together conditionally, [*If ſome Star do fall from the Sky to the Earth before ſuch a time*] this Contract is made void by this impoſſible Condition (*f*), becauſe the Parties did not otherwiſe intend to Contract Matrimony, nor yield their Conſents (but in Caſe this Caſe, which they thought poſſible) did come to paſs (*g*),

(*a*) c. fi Conditiones. de Condit. app. extra. Summa Hoſtienſ. Rub. de Cond. app. §. quæ Conditio. Henr. Boic. & omnes DD. in d. c. fi Conditiones.

(*b*) Panor. in d. c. fi Conditiones. n. 3. *Et hoc verum eſt favore Matrimonij, quemadmodum & favore Teſtamenti.* §. impoſſibilis Inſtit. de hæred. inſtituend. *In aliis autem contractibus, regulariter Conditio impoſſibilium vitiat, et non vitiatur, (ſi juri civili attendaturus) ut* Inſtitut. de inutil. Stipulat. §. impoſſibilis. *Jus autem municipale Regni noſtri Angliæ, quid de Conditione impoſſibili ſtatuit, videre eſt apud* Pereium, *non inerudite de hâc re differentem.* fol. (Libelli mei) 142. Tit. Condition.

(*c*) Præpoſ. in c. ſuper eo. de condic. appoſ. extra. n. 4. Covar. Tract. de Sponſal. ſecunda parte, c. 3. §. 2. n. 3. in princ. Specul. in Rub. de condic app. extra. n. 4.

(*d*) Ita diſtinguit Jo. Andr. refert Præpoſ. ubi ſupra facit L. Servo manumiſſo. ff. de cond. indebiti, nec diſſentit Covar. d. c. 3. §. 2. n. 3. verb. niſi poſſibilis videretur.

(*e*) Covar. Tract. de Sponſal. ſecunda parte, c. 3. §. 2. n. 5. Aretin. in L. impoſſibilis. ff. de verb. oblig.

(*f*) Covar. ubi ſupra verb. ſi enim.

(*g*) Covar. ubi ſupra. Cui continuit Hadr. in c. de matr. queſt. 6, 7.

without

without which Conſent true Matrimony is never Contracted (*h*). And ſo where two contract Matrimony [*If their Parents ſhall conſent*] it ſeemeth that they did not otherwiſe intend to marry, but in caſe their Parents ſhould like and allow thereof (*i*): Howbeit if the Parties, when they did mutually promiſe Matrimony conditionally, if their Parents ſhould conſent, did know they were dead, and ſo could not conſent, then is the Condition void, not the Contract (*k*), unleſs it appear to be the *meaning* of the Parties, by expreſſing an impoſſible Condition, not to yield their Conſents, but to dally the one with the other; for in ſuch a Caſe evermore the Contract is of no force, for want of true meaning and perfect conſent (*l*).

(*h*) L. Nuptias. ff. de Reg. Jur. c. cum locum, & ibi DD. de Sponſal. extra. (*i*) c. ſuper eo. in fin. de condic. app. extra. & ibi Præpoſ. n. 4. Covar. Tract de Sponſ. ſecunda parte, c. 3. §. 2. n. 5. (*k*) Jo. And. in addic. ad Specul. de condic. appoſ. litera (d) facit L. mulſta ff. de condic.

& demon. & Bar. in L. 1. de condic & Inſtit. ff. col. 2. Covar. Tract. de Sponſ. ſecunda parte, c. 3. §. 2. n. 3. verb. quod ſi in futur. &c. (*l*) Præpoſ. in c. ſuper eo. de Sponſal. extra. n. 4. per. c. Tua nos. de Sponſ. extra.

13. The Sum of this that I have here delivered (that I may make it ſomewhat plainer) is no more but a Rule and three Limitations. The Rule is, That impoſſible Conditions are rejected. The firſt Limitation is, when the impoſſibility ariſeth by ſome accident. The ſecond, when the Parties did believe the Condition poſſible. The third, when they had no meaning thereby to Contract themſelves, but to delude either the other. Whereunto a fourth may be added, namely, when as the impoſſibility indureth only whiles the Parties are alive together: As if the Man ſay, [*I contract Matrimony with thee, if thou ſhalt come to my Funeral or Burial*;] or thus [*I will marry thee, if thou do not diſcloſe ſuch a ſecret*,] with Conditions, becauſe they are againſt the Subſtance of the Act, nor can be fully accompliſhed whiles the Parties are alive, reſiſt the Nativity of the Bond or Obligation, and ſo make void the Contract (*m*); neither doth Carnal

(*m*) Covar. Tract. de Sponſal. ſecunda parte c. 3. §. 1. n. 15. Adrian. in 4. de Matrimonio q. 3.

nal Copulation thereupon enſuing betwixt the ſaid Parties, beget the preſumption of Matrimony betwixt them in this Caſe (*n*).

14. Poſſible Conditions are thoſe which be neither neceſſary nor impoſſible, but being placed in the midſt betwixt both extreams, are indifferent either to be, or not to be (*o*). Theſe poſſible Conditions, (if they be honeſt withal, (that is to ſay) not againſt Law, nor repugnant to good and wholſome Manners) do ſuſpend the Contract (*p*), ſo that, in the mean time, the Parties contracting Spouſals or Matrimony, under any ſuch Conditions, are neither bound, nor ſuable, until the Condition be extant (*q*). For Example, [*I will contract Matrimony with thee, if thou wilt give me* 100 l. (*r*)]; or thus, [*I do contract Matrimony with thee, if thy Father ſhall conſent* (*s*),] depending the Condition (that is to ſay, until thou give 100 l. or until thy Father conſent) there is neither Obligation nor Action, either for Spouſals or for Matrimony (*t*). And albeit in the ſecond Example the words be uttered in the Preſent Tenſe, yet by means of the Condition thereunto annexed, the force and efficacy of the Contract is ſuſpended, until the event of the Condition (*u*): For if we will ſpeak properly, Matrimony is not contracted, but when the Conſent is *pure* and *without Condition*, as well as preſent (*x*); wherefore I cannot chuſe but think that they did plainly err, and wander far from the right Path, who thought and taught, That preſent Conſent, albeit Conditional, did forthwith induce Matrimony, notwithſtanding the Condition were not as yet extant (*y*);

(*n*) Covar. poſt Adrian. ubi ſupra.

(*o*) Summa Hoſtienſ. de cond. app. extra. §. quæ conditio. Sichard. in Rub. de inſtit. & ſub. C. n. 9. Melchior Kling. Tract. de cauſ. Matrimonial. fol. 73.

(*p*) c. de illis. c. ſuper eò. de cond. app. extra & ibi Jo. And. Card. Panor. & Præpoſ.

(*q*) d. c. de illis. & c. ſuper, & ibi DD. Schneidwin. Tract. de Nuptiis, fol. 27. Melchior Kling. Tract. de cauſ. matrimonial. fol. 74. §. ſub conditione. & §. ex conditionali. Inſtit. de verb. oblig. L. cedere ff. de Verb. Sign. & ibi DD.

(*r*) c. de illis. de cond. app. extra. (*s*) c. ſuper eo de cond. appoſ. extra. (*t*) Summa Hoſtienſ. in Rub. de cond. appoſ. extra. §. quæ conditio. in princ. Schneidwin. Tract. de Nuptiis, fol. 27. n. 34. d. c. ſuper eo & ibi DD. (*u*) Panor. in d. c. ſuper eo. n. 5. & ibi Præpoſ. notab. 6. (*x*) Covar. Tract. de Sponſal. ſecunda parte, c. 3. n. 3. & facit L. actus legitimi ff. d. Reg. Jur. (*y*) unic. in d. c. ſuper eo. & Specul. in Rub. de condic. appoſ. extra. n. 2.

and

and contrariwiſe, that their Opinion is guided by the ſtraight line of Equity and truth, who do hold that the words, being conceived in the Future tenſe, (as in the former Example) neither Matrimony, neither Spouſals is contracted, before the accompliſhment of the Condition (z); and that the words being framed in the Preſent tenſe, (as in the later Example) they have the force of Spouſals only (a), or rather not ſo much (b), until the Condition be extant; Indeed, the Conditions being performed, then are they Spouſals in that Caſe, and Matrimony in this (c): Whereby we may gather two Rules concerning thoſe kind of Contracts, The one, that depending the honeſt poſſible Condition, the Contract is ſuſpended (d). The other, that the foreſaid Condition being performed, the Contract is then purified, or as if no Condition had been expreſſed (e). Either of which two rules hath two ſeveral Limitations thereto belonging.

(z) Innoc. in c. 1. de cond. appoſ. extra. Jo. And. in c. de illis. & Henr. Boic. in c. ſi conditiones eod. tit.

(a) Panor. in c. ſuper eo de condic. appoſ. extra. n. 7.

(b) Covar. tract. de Spouſal. 2. parte c. 3. n. 2. per text. in c. 1. §. ultim. de Sponſ. in Sext.

(c) Innoc. in c. 1. de condic. appoſ. & Henr. Boic. in c. ſi Conditiones. eod. tit. extra. Covar. tract. de Sponſal. 2. parte c. 3. nu. 2. (d) Innoc. in. c. 1. de cond. appoſ. extra. c. de illis. & c. ſuper eo. eod. Tit. & ibi Panor. & Præpoſ. Hoſtienſ. Summa Tit. decond. appoſ. §. quæ Conditio. Schneidwin. Tract. de Nuptijs fol. 27. (e) d. c. de illis. & c. ſuper eo. & ibi DD. L. potior ff. qui potiores in pig. hab. c. fraterintatis. de frigid. & malef. extra.

15. The Limitations of the former Rule are theſe; Firſt when the Parties after they have contracted Conditional Spouſals *de præſenti*, or *de futuro*, do before the event of the Condition know each other Carnally, for by this corporal Copulation they are deemed to have *renounced* the *Condition*; and preſently to yield their mutual Conſents to Contract and conſummate pure and perfect Matrimony (f), which Concluſion is diverſly both enlarged and reſtrained (g); as when we ſhall entreat of the effect of carnal Copulation more plentifully ſhall appear (h).

(f) c. per tuas. de condic. appoſ. extra. & ibi gloſſ.

(g) Menoch. Tract. de Præſump. lib. 3. præſ. 1. Covar. tract. de Sponſ. prima parte c. 4. §. 1.

(h) Infra §. 17.

16. Secondly, when the Parties, after the Conditional Contract, do ſimply, or without any Condition expreſs their mutual Conſents by words of the preſent time, fit for Matrimony; for in this Caſe alſo they are deemed to have renounced the Condition; and are preſently joyned in ſimple Matrimony, as if no Condition had been before expreſſed (*i*).

(*i*) c. de illis. de condit. appoſ. extra. & ibi gloſſ. c. de illis. de deſponſ. impub. extra. & ibi DD.

17. The Limitations of the ſecond Rule are theſe; Firſt when the Condition was infringed, before it was compleated, for being once infringed, the accompliſhment following is not regarded (*k*): For Example; the Parties having Contracted Matrimony [*if their Parents ſhall conſent*], So it is, that their Parents do firſt diſſent, but afterwards upon further adviſement their minds being altered, they become willing, and do now yield their Conſents thereunto, this new Conſent doth not re-eſtabliſh the Matrimony before diſſolved by their diſſent (*l*): Albeit ſome Writers (but without ſufficient Warrant I fear) do hold the Contrary, in caſe the Parties do ſtill perſevere in their former purpoſe, until their unwilling Parents do at the laſt yield their Conſents thereunto (*m*).

(*k*) L. bones. §. Sermone ff. de verb. Signif. Præpoſ. in c. ſuper eo. de condic. appoſ. extra. n. 4.

(*l*) Præpoſ. in d. c. ſuper eo. Tiraquel. in d. §. hoc ſermone. verb. octogeſimo primo. Clavaſ. in Summa Angel. verb. Matrimonium. el. 3. in tertio impedimento. n. 2. Silveſter. Prier. verb. Matrimonium el. 3. n. 4. verſ. tertium. in fin.

(*m*) Cardinal. in c. ſuper eo de condit. appoſ. extra.

18. Secondly, when as one of the Parties depending, the Condition doth Contract pure and perfect Matrimony with ſome other Perſon: This ſecond Matrimony ſimply contracted, is not overthrown by the ſucceeding Accompliſhment of the Condition of the former Contract (*n*): For Example; a Man and a Woman do contract

(*n*) c. 1. §. ultim. de Sponſal. in Sext. & tit. n. 7. & facit. c. quamvis. de reſcrip. in Sext. ibi DD. gloſſ. in c. per tuas. de condic. appoſ. extra. & Panor. in c. ſuper eo. eod. Præpoſ. in d c. per tuas. n. 7.

Ma-

Matrimony conditionally, [*If their Parents ſhall conſent thereunto*] before which Conſent the Man doth, without any Condition, contract perfect Matrimony with another Woman, after which Contract the Parents yield their Conſents to the former Contract: In this Caſe the ſecond abſolute Contract, doth prevail againſt the former conditional Contract (*o*).

(*o*) Panor. ubi ſupra. Præpoſ. in c. per tuas de condic. appoſ. extra. n. 7. & ibi gloſſ. Schneidwin. Tract. de nuptijs. fol. 28. Summa Roſella. verb. Matrimonium el. 5. verſ. quid ſi quis, &c.

19. Againſt this Limitation it is commonly objected; That a Condition purified is underſtood to be retired back again, to the time wherein the Contract was firſt made; and to be of force, not *ex nunc*, but *ex tunc*, that is to ſay, not from the time of the actual performance of the Condition, but as if it had been even then accompliſhed at the very beginning (*p*); or rather as if the Contract had always been pure and ſimple (*q*).

(*p*) L. potior. ff. qui potior. in pign. hab. facit. l. hæres quandocunque. de acquir. hæred. & l. quod dic. de teſto. Mil. ff. (*q*) Gloſſ. in c. per tuas. de condic. appoſ extra. Reuſner. tract. de Cauſis Matrimonial. conſil. 2. n. 40, & 41. Socin. Jun. conſil. 35. n. 2. vel. 1.

20. To which Objection, this is the ready Solution. That the purified Condition is then ſuppoſed to be retired backward, when as the Caſe in the mean time is not altered, nor the way ſtopped, or the paſſage hindred (*r*); But in our Caſe the way is intercepted, and the return letted by means of a perfect Contract, ſubſtantially made; and finiſhed during the imperfection of the former Contract (*s*), by force whereof the ac-

(*r*) Panor. in d. c. per tuas. in fin. & ibi Præpoſ. n. 7. Bar. in l. ſi indebitat. §. 1. ff. rem. rat. hab. &c. quamvis de reſcrip. lib. 6. (*s*) *Quippe, quia pendente Conditione, actus non dic. neceſſario perfectus §. quod ſi penden.* de peric. & com. rei vend. Pariſ conſil. 82. vol. 4. n. 6. Reuſner. tract. de cauſ. Matrimonial. conſil. 2. n. 5. qui tandem in Contrarium labitur Summa.

compliſhed Condition is repelled, and not ſuffered to have recourſe to the firſt Fountain, from whence it did originally iſſue, or proceed (*t*); And it is ſo much the more forceably repelled, when as the ſecond Contract is conſummate with carnal Copulation; for then, as well by the Civil Law (*u*), as by the Canon Law (*x*), this conſummated Contract doth overthrow the former conditional Contract: Marry Sir, if the Condition expreſſed in the former Contract, be not a voluntary Condition, but ſuch a Condition, as had it not been expreſſed, yet, nevertheleſs is ſecretly underſtood; Then whether this Contract prevail againſt the ſecond Contract of Matrimony, wherein no Condition at all is expreſſed, is a doubtful Queſtion; wherein ſome do affirm (*y*), and ſome deny (*z*), and ſome leave it doubtful (*a*); or if the Condition of the former Contract were a voluntary Condition, before the accompliſhment whereof, one of the Parties contracted, did not actually proceed to any Contract of Matrimony with any other, but verbally diſſented and diſclaimed from the Contract made, Whether by this diſſent only, the conditional Contract be diſſolved is a queſtion, wherein all Men are not of one mind (*b*); and yet aſwel this, as that, no leſs needful to be known to us, than doubtfully delivered by them; in regard whereof, it ſhall not be in vain, I hope, if we review either Caſe a little more diligently, and ſo grow to ſome certainty.

(*t*) Panor. & Præpoſ. in c. per tuas. de condic. appoſ. extra. alter nu. 8. alter. n. 7. Schneidwin. tract. de nuptijs fol. 28. Melchior. Kling. Tract. de cauſis Matrimonial. fol. 74. in fin.

(*u*) Reuſnerus. Tract. de cauſ. Matrimonial. conſil. 2. n. 26. cum Seq. per l. ſemper in conjunctionibus. ff. de rit. nup. & per Auth. itaque C. comm. de Succeſſ. Exemplo L. quoties de rei vendic. & L. ſive autem. §. Si duabus. de pub. in rem act. ff.

(*x*) c. per literas. de Sponſal. extra. Reuſnerus ubi ſupra.

(*y*) Archid. in c. unic. de Sponſal. in Sext. in fin.

(*z*) Cardinal. in d. c. unic.

(*a*) Clavaſ. Summa Angel. verb. Matrimonium. Impediment. 3. verſic. *Sed nunquid. qui ſane obſcurè loquitur, dum neceſſarium per neceſſarium & contingens diſtinguere videtur, id quod animadvertit.* Silveſtr. verb. Matrimonium. 8. q. 14. verſ. Septimum in fin.

(*b*) Ut per gloſſ. & DD. in c. ſuper eo. de condic. appoſ. extra.

21. In the former Caſe therefore, that is to ſay, when two Perſons do contract Matrimony together expreſſing this Condition, *viz.* [*Si Deus voluerit, if God will,* or *Si*

Si vixero, *If I ſhall live*; or *Si potero*, *If I ſhall be able*, &c.] ſome (as I ſaid) affirm that this is a *pure* and *ſimple* Contract (*c*); and therefore good againſt a ſecond Contract, whoſe reaſon doth chiefly reſt upon this Concluſion, *Expreſſio eorum quæ tacite inſunt nihil operatur* (*d*), the expreſſing of thoſe things which be ſecretly included worketh nothing. And ſo the expreſſing of that Condition which is ſecretly included in the Contract, doth not make it Conditional (*e*); for thoſe Conditions [*If God will* (*f*), *If I live* (*g*), *If I may* (*h*)], are ſecretly included in every diſpoſition, be it never ſo ſimple, or never ſo pure, never ſo not conditional; being therefore called *tacitæ Conditiones*, Secret Conditions, and *legitimæ Conditiones* (*k*) legal Conditions, becauſe the Law doth ſupply and underſtand theſe Conditions, though the Parties do omit them: To which purpoſe writeth *Oldendorpe* in theſe words, *Multa ſæpenumerò inſunt negotijs etiamſi non exprimantur nominatim, ut ſunt Conditiones legitimæ, non ex voluntate ſeu Conſenſu hominum, Sed ex authoritate Juris procedentes, & hæc quidem non faciunt negotium Conditionale* (*l*). Therefore there be many things in our affairs very often, although they be not expreſſed by name, as are legal Conditions, proceeding not from the Will or Conſent of Men, but from the Authority of Law; and thoſe do not make the Act conditional. Seeing then they do not make the Act conditional, not being expreſſed, being expreſſed they make it not conditional; for *Taciti & expreſſi par virtus, æqualis poteſtas, eadem ratio* (*m*); *tacitæ Conditionis expreſſio non reddit diſpoſitionem conditionalem* (*n*), of that which is ſecret, and that which is expreſ-

(*c*) Archid. in c. unic. de Sponſal. in Sext. in fin. Henr. Boic. in c. ſi Conditiones. de condic. appoſ. extra. in princ. Melch. Kling. tract. de cauſ. Matr. fol. 73. in fin. & 27. in princ.

(*d*) L. 3. de lega. 1. L. condit. de cond. & demon. ff.

(*e*) Henr. Boic. in c. ſi Conditiones. de condic. appoſ. extra. *ubi aliam aſſignat rationem, pempe quia iſta Conditio* [*Si deus voluerit*] *licet quoad verba ſit de futuro, tamen quoad veritatem (inquit) eſt de præſenti, ideoque non ſuſpenditur.*

(*f*) Epiſt. Jacob. c. 4. v. 15. c. beatus 22. q. 2. Innoc. in c. debitores de Jure jur. extra.

(*g*) Epiſt. Jacob. ubi ſupra L. ultim. ff. Si quis cautionibus (*h*) L. impoſſibilium ff. de Reg. Jur. L. continuus. §. illud. de verb. oblig. ff. (*i*) Summa Hoſtienſ. in Rub. de condic. appoſ. extra. Dominic. & Phil. franc. in c. unic. de Sponſ. in Sext. in fin Bar. & alij in L. 3. ff. de leg. 1. (*k*) Jo. Olden. Topic. Legel. loco. ab authoritate fol. (mihi) 105. (*l*) Olden. ubi ſupra. (*m*) Everard. loco ab. expreſſo ad tacitum, & contra. (*n*) Bar, Jaſ. Zaſ. & alij DD. in L. 3. ff. de leg. 1.

ſed,

ſed, there is like vertue, equal power, and the ſame reaſon; the expreſſing of a ſecret Condition doth not make the diſpoſition conditional; which Poſition being true, then it followeth neceſſarily, that the ſecond Contract is not good; For if any Man do ſimply contract Matrimony with two ſeveral Women, the firſt Contract ſhall prevail (*o*); Contrariwiſe ſome do ſtick to this Opinion, That the Contract of Matrimony, wherein theſe Conditions [*if it ſhall pleaſe God, if I ſhall be alive, if I ſhall be able, &c.*] be expreſſed, are conditional (*p*); and therefore, if either of the Parties do ſimply Contract Matrimony with ſome other Perſon, the ſecond Contract is good, notwithſtanding the former (*q*); and certainly I muſt needs ſay, that if the antecedent be ſure, the conſequent is ſound, that is to ſay, if the former Contract be conditional, the ſecond Contract not conditional is good (*r*): So that *hic labor hoc opus eſt*, here is the very pinch; and this is the bleeding point, whether this foreſaid Contract be conditional or not: Now that it is conditional they prove in this wiſe; All Marriages (ſay they) are not made according to the Will of God (*s*), in aſmuch as ſundry Perſons, ſundry times match together in Wedlock, which nevertheleſs are forbidden, both by Gods Law, and Mans Law: As they which be a kin within the *Levitical* Laws and Degrees (*t*), or theſe which be already Married (*u*); and they which only ſeek to ſatisfie their foul Luſts, like brute Beaſts, never conſidering the true Cauſes, for which Matrimony was ordained (*x*); and ſuch like (*y*):

(*o*) c. ſi inter de Sponſal. extra.

(*p*) Covar. tract. de Sponſal. 2. parte c. 6. §. 2. n. 4. Felin. in c. 2. de Sponſal. extra. in princ. Hoſtienſ. in c. ad audientiam. de Sponſal. extra gloſſ. in c. unic. de Sponſal. in Sext. viz. col. 4. & ibidem Cardinal. Prier. in Summa quæ dic. Silveſtrin. verb. Matrimonium. el. 8. q. 13. verſic. Seplin.

(*q*) *Siquidem Contractum, pendente Conditione, ſimpliciter factum valet.* Communis eſt Summa. gloſſ. & DD. in c. per tuas. de condic. appoſ. extra. (*r*) Gloſſ. in c. per tuas. & Panor. in e. ſuper eo. de cond. appoſ. extra. c. unic. de Sponſal. in Sext. c. quamvis de reſcrip. in Sext. (*s*) Clavaſ. in ſumma, quæ dicitur Angelica verb. Matrimonium. Impediment. 3. verſic. ſed nunquid. in fin. Silveſtr. Prier. verb. Matrimoninm. el. 3. n. 3. *ubi diſtinguit inter voluntatem beneplaciti, & voluntatem Signi.* (*t*) Levitic. c. 18. (*u*) L. eum qui. C. de adul. lib. 1. conſil. Matr. conſil. ibidem. 15. n. 24. (*x*) Silva nuptialis fol. 135. n. 11. Præpoſ. in c. tua nos. el. 1. de Sponſal. extra. notab. 1. Socin. conſil. 28. col. 3. verſic. tertio. (*y*) Infra. 2. parte §.

Wherefore

Wherefore when any Man doth contract Matrimony under theſe terms [*if it pleaſe God* , or *if I may, &c.*] it is in effect as if he had thus ſaid [*I am not certain whether it be Gods Will, or whether the Laws will permit, that I Marry thee; for it may be thou art my near Kinſwoman, or thou art already aſſured to another Man, or ſome impediment there may be, which at this preſent I do not know; But if it ſhall appear, that there is not any ſuch impediment either by Gods Law, or Mans Law; but that we may be joyned together in Wedlock, and live together as Man and Wife, I do here contract Matrimony with thee* (z)]: And there is a very ſtrong Text for this Conſtruction, where it is written, That if a Man do bequeath any thing in his Will to any other Perſon, with this Proviſo [*Si volet* (a), *If he will*] this Legacy is conditional (b), becauſe theſe words [*Si volet, If he will*] do carry this ſenſe, If it appear that he be willing (c). And ſo in our Caſe theſe Conditions [*Si Deus voluerit; Si potero*, &c. *If God will; If I may,*] are thus to be underſtood, [*Si apparuerit Deum velle, vel me poſſe* (d), *If it ſhall appear that God be willing*, or *that I may:*] Therefore until it appear whether God be willing; that is to ſay, until it be known, whether there be any thing in God's Law, or Man's Law, to hinder this Marriage; in the mean time the Contract is ſuſpended as a Conditional Contract (e). To the Reaſons or Grounds of the former Opinion, namely, That the expreſſing of thoſe things which be ſecretly included hath no operation, or that there is like virtue, equal power, and the ſame Reaſon of that which is ſecret and that which is expreſt; or that a ſecret Condition expreſt doth not make the diſpoſition Conditional, &c. One Anſwer is yielded to them all, (the Poſitions being all but one in Senſe and Subſtance) which Anſwer is this; That theſe Poſitions are all true, *quando tacitum non aliter exprimitur quàm*

(z) Covar. Tract. de Sponſal. ſecunda parte, c. 6. §. 2. n. 4. Prier. in ſua Summa, quæ dicitur Silveſtrina. verb. Matrimonium. el. 8. q. 14. verſic. Septimo, *qui tamen ſibi diſtinguunt quos velim videas ipſe.*

(a) L. Si ita legatum. §. 1. ff. de leg. 1. & Covar. ubi ſupra.

(b) eod. §. 1.

(c) Bar. Jaſ. & alii DD. in d. L. ſi ita.

(d) Prier. verb. Matrimonium. el. 3. n. 3. Covar. Tract. de Sponſal. ſecunda parte, c. 6. §. 3. n. 4.

(e) Prier. & Covar. ubi ſupra.

quàm ineſt (*f*), when this Secret is not otherwiſe expreſſed outwardly, than it is inwardly; that is to ſay, when the ſenſe and meaning of that which is expreſſed, doth not differ from that which is included; for when they both agree in one meaning, then both have one effect (*g*), and ſo the Contract is pure and ſimple, and not conditional: And although this Condition [*Si Deo placuerit, If it ſhall pleaſe God,*] in reſpect of the words, be of the Future Tenſe, and ſo may ſeem to ſuſpend the Contract (*h*), at leaſt for a while; yet (as our old Countryman *Boic* writeth very pithily) *quoad veritatem iſta Conditio eſt de præſenti* (*i*), In reſpect of the truth this Condition is of a thing preſent, and ſo the Contract doth not admit any further delay or expectation of future event (*k*), and therefore not conditional (*l*); I mean, when this Condition [*Si Deo placuiſſet, If it ſhall pleaſe God,* &c.] is ſo expreſſed as underſtood (*m*), that is, referred to the ſecret Will of God, againſt the which nothing can be done (*n*); not to his Will revealed, againſt the which many things are done (*o*); for then, as I ſaid before, the Contract is conditional, becauſe it is otherwiſe expreſſed than is included (*p*); for being expreſſed, it is referred to the Will revealed (*q*), which ſome call *voluntatem ſigni* (*r*); whereas being not expreſſed, it is referred to his ſecret Will, which they call *voluntatem beneplaciti* (*s*). But you will ſay, What hath this Diſtinction of God's ſecret and revealed Will to do, where the Condition is not [*If God will, If it pleaſe God,* &c.] but [*Si vixero, If I live; Si illa viciſſim in me conſenſerit, If ſhe likewiſe conſent to me,*] and ſuch like. You

(*f*) Bart. in l. ſi ita legatum. §. 1. & leg. 1. n. 2. & ibi Paul. de Caſtr. n. 5. Panor. in c. ſignificaſti. de elect. n. 6. & Felin. in c. ad audientiam el 2. n 10.

(*g*) Bar. Paul. de Caſtr. Panor. & Felin. ubi ſupra.

(*h*) Gloſſ. & DD. in c. unic. de Sponſal. in Sext.

(*i*) Henric. Boic. in c. ſi conditiones de cond. appoſ. extra. in princ.

(*k*) Henr. Boic. ubi ſupra. & in c. ad audientiam de Sponſal. extra.

(*l*) *Quippe quæ ad præſens, vel ad præteritum refertur Conditio, nec ſuſpendit actum, nec conditionalem reddit, etiamſi contrahentes lateat extitiſſe Condionem.* L. cum ad præſens. ſi cert. pet. ff. & ibi gloſſ. *& reſpiciendum eſt, Non quid nos ignoremus, ſed quid in natura ſit*; i. e. *in veritate facti, Inquit.* J. Cuj. in L. reſpiciend. eodem Tit.

(*m*) Præpoſ. in c. ad audientiam. de Sponſal. extra. col. ultim.

(*n*) *Dominus exercituum decrevit quis poterit infirmare? Inquit* Iſaias c. 14. verſ. 27. & Paul. Epiſt. ad Roman. c. 9. verſ. 19. *voluntati ejus quis reſiſtit?* 22. q. 2. c. beatus.

(*o*) Geneſ. c. 3. verſ. 11. Rom. c. 5. n. 12. c. merito. & cita. 15. q. 1.

(*p*) Præpoſ. in c. ad audientiam de Sponſal. extra. ultim. col.

(*q*) Silveſt. Prier. Verb. Matrimonium. el. 3. q. 3. in fin.

(*r*) Ibidem.

(*s*) Ibidem.

ſay

ſay well; therefore to meet with this and the like Queſtions, divers Authors have deviſed divers Diſtinctions (*t*): Some make difference, whether this ſecret Condition be neceſſary to the Act, as [*If I live*;] or to the Conſent, as *If it ſhall pleaſe the Church* (*u*):] Teaching that in the former Caſe, the Condition being expreſſed, doth not make the Contract conditional, but in the later it doth (*x*). Others have invented this Diſtinction; That ſome Conditions are ſo neceſſarily included, as without the ſame the Contract cannot hold (*y*); and theſe, albeit expreſſed, do not ſuſpend the Contract, nor make it conditional (*z*): Of this ſort are theſe Conditions, [*If I live, If ſhe likewiſe conſent, &c.* (*a*)]. And ſome again are not ſo preciſely neceſſary, as without the which the Contract doth utterly periſh, but are rather included *de benè eſſe*, and for avoiding of ſin (*b*); of this ſort are theſe foreſaid Conditions, [*Si Deo non diſplicuerit, Si Jura non contradixerint* (*c*); *If it ſhall not diſpleaſe God, If the Laws will not gainſay it.*] And theſe Conditions being expreſſed make the Contract conditional, and do ſuſpend the Act, until the truth thereof do appear (*d*).

(*t*) Summa Angel. verb. Matrimonium, Imped. 3. n. 1. Summa Silveſtr. verb. Matrimonium. §. 3. q. 3. & §. 8. q. 14. verſ. ſeptimum Adrian. in 4. de Matrimonio §. circa q. 4.

(*u*) Adrian. ubi ſupra.

(*x*) Adrian. ubi ſupra. quem ſequitur Covar. Tract. de Sponſal. ſecunda parte, c. 6. §. 2. n. 4

(*y*) Prier. verb. Matrimonium §. 8. q. 13. verſic. ſeptimum poſt. Clavaſ. verb. Matrimonium impediment. 3. verſ. ſed nunquid.

(*z*) Prier. & Clavaſ. eiſdem locis. (*a*) Prier. & Clavaſ. ubi ſupra. (*b*) Summa Angel. verb. Matrimonium Impediment. 3. verſic. ſed nunquid & Silveſtr. Prier. verb. Matrimonium. §. 3. q. 3. & §. 8. q. 13. verſic. ſeptimum. (*c*) Silveſtr. Prier. de §. 8. verſic. ſeptimum *qui tamen ibi profert exempla præſentis temporis, nempe niſi Deo diſpliceat, niſi ſit contra jura*, &c. (*d*) Silveſtr. ibidem.

22. Now to the other Controverſie not altogether ſo difficult, whereof the Caſe is this; A Man and a Woman contract Matrimony together, expreſſing ſome voluntary Condition, *viz.* [*If their Parents ſhall conſent,*] before the accompliſhment of which Condition (that is to ſay, before their Parents do conſent,) one of the Parties expreſly then diſſenteth, and diſclaimeth from the

Contract; which done, their Parents do conſent; whether in this Caſe the conditional Contract be purified and made perfect Matrimony, is a Queſtion, wherein all Men are not of one Judgment (*e*): For ſome ſay that it is (*f*), others that it is not (*g*); howbeit, the Authors of the Affirmative, as they are but few in number (*h*), ſo are their Reaſons weak and feeble (*i*); for their ſtrongeſt Reaſon (that I read of) is this, They which have contracted Matrimony together conditionally, are to expect the event of the Condition, and ought not to revoke their Conſent in the mean time (*k*); and therefore if either of them notwithſtanding do revoke his or their Promiſe, this revocation being prohibited by Law, is not to be regarded (*l*), and conſequently the Condition being accompliſhed, the Contract is to be deemed, as if no diſſent had ever been interpoſed; that is to ſay, for a pure and abſolute Contract of Matrimony. Whereunto it is fully and truly anſwered, That albeit the Parties, conditionally contracted, are to expect the event of the Condition (*m*), being an honeſt and poſſible Condition, as this is, yet doth it not follow, that if either Party do indeed diſſent and diſclaim, the ſame ought therefore not to be regarded; for who knoweth not this Leſſon, *Multa prohibentur fieri, quæ tamen facta firmitatem obtinent* (*n*), Many things are forbidden to be done, which notwithſtanding, being done, are of force; which Concluſion is beautified with no leſs than twenty Caſes or Examples collected by *Jaſon* (*o*) the Civilian (no leſs famous for his Golden Le-

(*e*) Gloſſ. & DD. in c. ſuper eo. De condic. appoſ. extra.

(*f*) Panor. in d. c. ſuper eo. n. 7.

(*g*) Anto. de Butr Phil Franc. & Præpoſ. in d. c. ſuper eo. Covar. Tract. de Sponſal ſecunda parte, c. 3. n. 6. in princ. Summa Roſella. verb. Matrimonium 5. verſ. quid ſi quis. Summa Silveſtrin. verb. Matrimonium §. 3. q. 4. in princ.

(*h*) *Solus enim ſtat* Panor. *in hac Sententia, ſi is ſtare ſit dicendus, & non vacillare potius, qui dubitanter loquitur in* d. c. ſuper eo.

(*i*) Argumenta gloſſæ ſunt L. ſi mandaſſem ff. mandati. c. ex parte, de reſcript. & c. mandato. de procur. ff. ſed malè ut refert. Præpoſ. in d. c. ſuper eo. *unde* Gloſſa, *eis poſtea relictis, in contrariam Sententiam deſcendit, ratio verò quâ nititur* Panor. Sumitur ex L. Potior ff. Qui pot. in pig.

(*k*) Panor. in d. c. ſuper eo. perd. l. potior. & ibi gloſſa. per c. de illis. de deſponſ. impub. extra.

(*l*) *Ex quo (inquit* Panor. in d. c. ſuper eo) *obligavit ſe ſub conditione; non potuit ab illâ obligatione recedere.*

(*m*) *Id quod utrinque conceditur,* Præpoſ. in d. c. ſuper eo. n. 3. in fin. Covar. Tract de Sponſal. ſecunda parte. c. 3. n. 6. extra. c. nos novimus. 17. q. 2. & c. ſi vir. 27. diſtinct. al. jur.

(*n*) c. ad applicam, de regular. & tranſeun.

(*o*) Jaſ. in l. pr' furioſo. ff. de his qui ſui, vel

ctures

ctures, than *Jaſon* of *Theſſaly* for his Golden Fleece). Again, If this Prohibition were of that ſtrength and might, that it did overthrow all contrary Acts, atchieved and executed, depending the Condition of the former Contract, then alſo the ſecond Contract of Matrimony made before the accompliſhment of the Condition of the former Contract, ſhould be overthrown by force of the ſaid Prohibition (*p*), for the leſs being prohibited, the greater is the rather prohibited (*q*); that is to ſay, if the Parties be prohibited to diſſent only, much more are they prohibited to contract Matrimony with any other Perſon depending the Condition of the former Contract. But even by their own Confeſſion, who plant their chief hold upon this Prohibition, the ſecond abſolute Contract is good, notwithſtanding the ſuſpenſe of the Condition of the former Contract, and notwithſtanding that the ſame Condition is afterwards accompliſhed (*r*); nor that only, but they do alſo yield a Reaſon thereof, namely, That the conditional Contract hath no more force, but of Spouſals *de futuro*, depending the Condition (*s*); and therefore by their own Reaſon they overthrow their own Aſſertion; for if a conditional Contract of Matrimony have no more force than Spouſals *de futuro* (as indeed it hath not, neither yet ſo much (*t*), during the ſuſpence of the Condition;) Therefore if either of the Parties withdraw their conſent before the accompliſhment of the Condition, then cannot theſe Spouſals by the Fathers conſent become Matrimony (*u*): For this is without queſtion, That without pure and perfect conſent of both Parties, Matrimony cannot be contracted (*x*). And to be brief, this is the principal Reaſon which the Authors of the Negative Opinion do uſe for proof thereof, namely, the defect of

(*p*) *Eâdem enim ratione in utroque caſu militante, & idem nos conſtitui oportet, nec Caſus diverſitas ſed rationis identitas inſpici debet.* Cavetta conſil. 190. vol 1. n. 2. & conſil. 183. n 3.

(*q*) Peckius in c. cui licet. de Reg. Jur. in Sext. in princ.

(*r*) Panor. in c. ſuper eo. de condic. appoſ. extra. n. 7.

(*s*) Panor. ubi ſupra.

(*t*) Covar. Tract. de Sponſal. ſecunda parte. c. 3. n. 5.

(*u*) Præpoſ. in d. c. ſuper eo n. 3. & ibi. Cardinal. in fin. Covar. ubi ſupra n. 5. & 6.

(*x*) c. ſufficiat 27. q. 2. L. Nuptias ff. Reg Jur. c. cum locum. de Sponſal. extra. & ibi DD.

pure and perfect Conſent (*y*). This is that Wall of Braſs which the Adverſaries may well ſhoot at, but are never able to batter, nor make any breach into; neither is it material whether the other Party or Parents were witting or ignorant of this diſſent (*z*); for neither in the one Caſe, nor in the other, can there be any perfect Matrimony for want of the Parties perfect Conſent, at ſuch time as the Parents yield their Conſent (*a*); for even then alſo ought both Parties to agree (*b*) in one and the ſame Mind, otherwiſe there is not *Conſenſus*, i. e. *ſimul ſenſus* (*c*), and conſequently no *Matrimony*.

(*y*) d. c. ſufficiat. & d. Nuptias DD. in c. ſuper eo. de cond. appoſ. extra. Covar. tract. de Sponſal. 2. parte c. 3. n. 5, & 6. (*z*) Ant. de Butr. Phil. franc. & Præpoſ. in d. c. ſuper eo. Arg. c. ultim. de procur. in Sext. & Covar. ubi ſupra.

(*a*) Silveſtr. Prier. verb. Matrimonium §. 3. q. 4. in princ. (*b*) Gloſſ. in c. ſuper eo de condic. appoſ. extra. Summa Roſella. verb. Matrimonium. el. 5. verſic. Quid ſi. (*c*) Geminian. in c. ſi oblato. de literis conteſtat. in Sext.

23. Well, let us vary the Caſe a little, and ſee what will become of it. Say that the Parties having contracted Matrimony together conditionally, [*If their Parents ſhall conſent*] do neither of them diſſent, but do both perſevere ſtill in the ſame purpoſe until their Parents be acquainted therewith, who make no ſhew to or fro, by expreſſing either Conſent or Diſſent; Whether in this Caſe is it to be adjudged for Matrimony, or not?

24. Some are of opinion, That foraſmuch as the Parents did not preciſely perform the Condition, that is to ſay, formally expreſs their Conſents, therefore it is no Matrimony (*d*): But the greater part incline to the contrary Opinion (*e*), Becauſe in favourable Caſes, he that is ſilent doth ſeem to conſent (*f*); and ſo Matrimony being a very favourable Cauſe (*g*), it is as if they had formally and expreſly yielded their Conſents (*h*).

(*d*) Clavaſius in Summa, quæ dicitur Angelica. verb. Matrimonium Imped. 3. verſic. Sed quid ſi. (*e*) Cardinal. poſt. Hoſtienſ. in c. ſuper eo de condic. appoſ. extra. & ibi Præpoſ. n. 4. (*f*) c. qui licet. de Reg. Jur. in Sext. Inno. in c. geneſi. de elect. extra. Felin. in c. Nonne de Præſump. extra. Reg. 4. & Præpoſ. ubi Supra. (*g*) c. in fin. de Reg. Jud. extra. Felin. in Rub. de Sponſal. extra. (*h*) DD. in d. c. ſuper eo.

25. To

25. To that, that Conditions are to be preciſely performed (*i*), it is anſwered; That's true generally in other Contracts; but in a Contract of Matrimony it is ſpecial, that the Condition is ſufficiently performed by other *æquivalent* means, as well as by preciſe obſervation of the ſtrict form of the Condition (*k*); and ſo the Common Opinion is to be preferred, at leaſt if the Parties do not afterwards break off, and beſtow themſelves in Marriage otherwiſe (*l*).

(*i*) L. qui hæredi. §. 1. & L. Mævius. ff. de condic. & demon.

(*k*) Cardinal. & Præpoſ. in d. c. ſuper eo.

(*l*) *Quod ſi ad ſecunda vota deventum fuerit, tunc alteram opinionem, uti*

veriorem amplectitur, Clavaſius in ſua Summâ Angelica. verb. Matrimonium. Imped. 3. verſ. Sed quod Si.

26. What ſhall we ſay to this caſe? A Man and a Woman do contract Matrimony conditionally, [*if he give her* 100 *l. at ſuch a time*]; Which Woman afterwards doth alſo contract Matrimony with another Man, under the ſame Condition, that is, [*if he give her* 100 *l. at the time aforeſaid*]: Which time being come, either of theſe Men giveth to this Woman 100 *l.* at one and the ſame inſtant; in this Caſe Whether Contract ſhall prevail?

27. By the Common Opinion of ſuch as write upon this queſtion, neither Contract ſhall prevail (*m*), by reaſon of the uncertainty (*n*); for ſince it is uncertain which Condition was firſt performed, it cannot be certain, whether Matrimony is to be perferred: And therefore it is of no more force, than if ſhe had contracted Matrimony with two ſeveral Men at once (*o*); And although it may ſeem, that the Matrimony firſt contracted, is firſt to be effected (*p*), becauſe the Condition being purified, the Contract is reputed as if it had

(*m*) Jo. And. in c. 1. de conſt. app. extra. *qui rejectis tribus opinionibus quartam jam ocitatam ponit, quam tenent* Gaſper. Cald. Jac. Zochus & Præpoſ. in d. c. 1.

(*n*) Arg. L. ſi

(*o*) Summa Angelic. verb. Matrimonium imped. 3. verſ. ſed. pone. Jo. And. & Præpoſ. in d. c. 1. de condic. extra. Prier. verb. Matrimonium §. 3. q. 6.

(*p*) *Prior tempore potior jure.* c. qui prior. de Reg. Jur. in Sexto. L. quotiens. de Reg. Jur. ff.

fuerit ff. de reb. dub. L. Duoritij ff. de teſta. c. ex literis. el. 2. de Sponſal. extra

been

been absolutely and simply made at the first (*q*): Yet that is so understood, when as it is in the power of the Party to prejudice the second Contract, otherwise not (*r*): Howbeit, if either Condition had been performed before the other, that Contract were to be preferred, whose Condition was sooner compleated, though it were but a very little (*s*).

(*q*) L. potior. ff. qui potior in pig. hab.

(*r*) Bart. in l. si indebitatum. §. 1. ff. rem. rat. hab. Panor. in c. per tuas. de cond. app. in fin. & Præpos. in c. 1. eod. tit.

(*s*) Prier. verb. Matrimonium. el. 3. q. 6. in fin. facit Tiraquel. de Judic. in reb. exig. Lin. 3.

28. Unhonest Conditions are they which be contrary to *Laws* or *good Manners* (*t*); and are often called impossible, that we should think each thing impossible to be done, which is unlawful to be done (*u*).

(*t*) L. impossibilis. ff. de verb. Ob. & ibi DD.

(*u*) L. Si filius. ff. de condic. instit.

29. Unhonest Conditions against the Substance of Matrimony, are they which be *repugnant* to any of the three Substantial good things, or Blessings for which Matrimony was ordained (*x*) namely *bonum prolis, bonum fidei, & vinculum individuum* (*y*), the good of Issue, the good of Faithfulness, and the Bond inseparable; Which others call Sacraments, though improperly (*z*); For, for these three ends was Marriage invented and established; first, for the procreation of Children to be brought up in the fear of God, whereby his Church may be continued and increased (*a*). Secondly, for the avoiding of Fornication; and that either Party shall be Faithful to other, keeping their Vessels undefiled (*b*). Thirdly, for the mutual Cohabitation and comfortable help

(*x*) DD. in c. fin. de cond. appos. extra.

(*y*) Covar. tract. de Sponsal. 2. parte. c. 3. §. 1. n. 1. Silva nuptialis. lib. 2. in princ. n. 9.

(*z*) c. omne 27. q. 2. *ex Augustino de bono conjugali vel potius de nuptiis & Concupiscentiâ.* c. 11, & 12. ut animadvertit. Covar. Tract. de Sponsal. 2. parte c. 3. §. 1. n. 2. in fin. Præpos. in Rub. de Sponsal. extra. n. 14.

(*a*) c. omne 27. q. 2, c. pudor. & sequent. 32. q. 2. Præpos. in Rub. de Sponsal. extra. n. 11, & 12. Anto. Gubertus. Tract. de Sponsal. fol. 49. n. 1.

(*b*) c. quicquid. c. sicut. 32. q. 2. Præpos. ubi Supra. Epist. Paul. ad Corinth. 1. c. 7.

and

and Society, never to be diſſolved, ſo long as the Married Couple ſhould live together, whether it were in proſperity or adverſity (*c*). Wherefore theſe Conditions [*Si prolis generationem evitaveris*, if thou ſhalt avoid generation of Children, *Si adulterand' te tradideris*, if thou wilt play the Adultereſs, *Donec inveniam meliorem*, until I find a better].

(*c*) c. Nuptiarum. 27.q.1.c. omne. 27.q.2. Præpoſ. in c. ult. de cond. appoſ. n.3.

30. Theſe Conditions, I ſay, and every of them are not only unhoneſt, but alſo againſt the Subſtance of Matrimony, for that they be oppoſed to thoſe things, without the which true Matrimony cannot conſiſt (*d*); and therefore if two Perſons ſhall contract Spouſals or Matrimony together, under any of theſe aforeſaid Conditions, this their Contract is void in Law (*e*): Whereas if the Condition were only unhoneſt, but not againſt the Subſtance of Matrimony, the Condition were rejected, and the Contract good (*f*); either of which Rules have their ſeveral Ampliations and Limitations: But before we deſcend thereunto, it is requiſite to foreſee what may be objected againſt the former general Rule.

(*d*) Text. in c. ultim. de condic. appoſ. extra. & ibi Præpoſ. n 5. Covar. tract. de Sponſal. 2. parte c. 3. §.1. n.1. Silveſter Prier. verb. Matrimonium §.4.q.5.

(*e*) d.c. ultim. infra parte. c. aliquando. 32. q. 2. faciat l.

cum lic. §. Si præter. ff. de tranſac. (*f*) eod. c. ultim. ſecunda parte.

31. Firſt therefore, where I affirmed this Condition [*Si prolis generationem evitaveris, if thou ſhalt avoid the generation of Children*] deſtroyeth the Contract (*g*), becauſe it doth withſtand the firſt and principal good of Matrimony, viz. *bonum prolis* (*h*), the good of Children. It may be objected; That if a Man do contract Matrimony with a Woman conditionally, [*if ſhe ſhall lead her life in perpetual Continency*] doth not make void the Contract (*i*): This Condition (albeit directly againſt the firſt and principal end of Marriage, namely *bonum prolis*, the good of Children) is not void, which objection is the rather confirmed by the example of *Joſeph* and

(*g*) c. ultim. de condic. appoſ. extra. c. aliquando. 32.q.2.

(*h*) Præpoſ. in d.c. ultim n.2. Covar. tract. de Sponſal. 2. parte. c.3.§. 1.in princ.

(*i*) Bald.in.4.diſtinct.30.q.2. concluſ.2.de quo Covar. ubi ſupra.

and *Mary*, betwixt whom there was true, perfect and inſeparable Matrimony, notwithſtanding the true, perfect and perpetual Continency and Chaſtity, vowed and performed by the bleſſed Virgin (*k*): Nevertheleſs this Example doth not prove the former Poſition; For though it be very true, that the bleſſed Virgin had determined and reſolved with her ſelf faithfully to keep the Vow of Virginity; Yet as the Doctors do teſtifie, *propoſuit ſe ſervaturam virginitatis votum in Corde, ipſa autem votum non expreſſit ore* (*l*), She purpoſed to keep the Vow of Virginity in her Heart, but ſhe did not expreſs this Vow with her Mouth: And ſo the bleſſed Virgin did ſo Vow Virginity, as therein ſhe did not any thing againſt the Subſtance of Matrimony (*m*). Like as on the other ſide, ſhe did ſo conſent to Matrimony, as ſhe did nothing contrary to Virginity; *Conſenſit enim, non in actum Copulæ, ſed in potentiam, certior divinitùs facta Joſephum in eodem Caſtitatis voto permanſurum, nec eam cogniturum* (*n*); She conſented not unto the Act of Copulation, but unto the power, being divinely aſſured that *Joſeph* was to continue in the ſame Vow of Chaſtity, and would not know her. Again in this ſacred Marriage betwixt *Joſeph* and *Mary*, there were all theſe three good things above recited, That is to ſay, *bonum prolis, quia Chriſtus natus*; *bonum fidei, quia nullum adulterium*; *vinculum individuum, quia nullum divortium* (*o*). The good of Iſſue, becauſe Chriſt was born; the good of Faithfulneſs, becauſe no Adultery; the Bond inſeparable, becauſe no Divorce.

(*k*) vide Covar. Tract. de Sponſal. 2. parte c. 3. §. 1. n. 3.

(*l*) c. Beata Maria. 27. q. 2. poſt. Auguſt. de bono conjugali. Gloſſ. in c. ſufficiat. 22. q. 2. verb. voti virginalis.

(*m*) Covar. tract. de Sponſal. 2. parte c. 3. §. 1. n. 4.

(*n*) Covar. ubi ſupra. poſt. Tho. in 4. diſtinct. 30. q. 2. ar. 1. c. Conjux. 27. q. 2. ex Auguſtino. de nuptiis & Concupiſcen. c. 11, & 12. *unde Gratianus aſſumpſit, tametſi in* L. *decretorum tribuatur.* Auguſt. in lib. de bono Conjugij. ut refert Covar. ubi ſupra.

(*o*) d. c. omne. 27. q. 2. ex eod. Auguſtino ubi ſupra & gloſſin d. c. omne.

32. Secondly, where I affirmed, that this Condition [*ſi adulteraverit te tradideris, If thou wilt become an Adultereſs*] deſtroyeth the Contract of Matrimony (*p*), becauſe it is contrary to the ſecond good, for which Matri-

(*p*) c. ultim de condic. appoſ. extra.

Matrimony was ordained, which is *bonum fidei* (*q*), it is objected and affirmed by others, that this Condition is not againſt the Subſtance of Matrimony, (and therefore doth not deſtroy the Contract) unleſs this alſo had been added, that ſhe ſhould deny to pay her due to her Husband (*r*); But it is anſwered, that this faithfulneſs doth not only include the debt of Marriage, which one of them ought to yield to other; But this alſo is excluded, That either of them ſhould yield their Bodies to any other (*s*); And therefore not only that Condition is *contra bonum fidei*, when they indent not to pay their dues to themſelves, but that Condition alſo of committing filthineſs with any other (*t*).

(*q*) Præpoſit. in c. ultim. n. 4. Covar. in tract. de Sponſal. 2. parte c. 3. §. 1. n. 1.

(*r*) Angel. de Clavaſ. in Summa. verb. Matrimonium. Imped. 3. n. 11.

(*s*) Covar. tract. de Sponſal. 2. parte c. 3. §. 1. n. 2. Prier. in Summa Silveſtr. verb. Matrimonium. el. 4. q. 6. poſt Tho. in 4. diſtinct. 31. q. 1. ar. 2.

(*t*) Covar. ubi ſupra. *Licet magis fortaſſe ſit contra bonum fidei, negare debitum conjugale quàm alteri commiſceri, quemadmodum & ad bonum prolis pertineat, non ſolum ſuſcipere, ſed etiam educare prolem ſuſceptam, at illud principalius ſecundum.* Silveſtr. verb. Matrimonium. el. 4. q. 6.

33. Thirdly, where I affirmed that this Condition, [*Donec inveniam meliorem, until I find a better*] doth make void the Contract (*u*), becauſe it is againſt the third good of Matrimony, *id eſt*, *vinculum individuum* (*x*), the inſeparable band: It may be objected that this Contract is not *Conditional*, but *Modal*, by reaſon of this word [*Donec* (*y*), *until*]; and therefore the contract is to take place, and ſo to continue, [*donec*, *until*], that accident come to paſs (*z*); which becauſe it can never happen (for that the exchange of Wives and Husbands was and is perpetually unlawful (*a*); therefore is the Contract to continue for ever (*b*): Nor is it ſtrange that

(*u*) Text. in c. ultim. prima parte de cond. appoſ. extra.

(*x*) Gloſſ. & DD. eod. c. ultim. Covar. Tract. de Sponſal. Secunda parte. c. 3. §. 1. n. 1. in fin. *eſt enim inſeparabilitas eſſentialis Matrimonij.* Teſte Silveſtr. Prier. verb. Matrimonium §. 4. q. 5.

(*y*) Zaſ. in L. centeſimus §. fin. ff. de verb. ob. n. 8, & 9. *ubi refert ſe in conſilio quodam ſalvaſſe mulierem, quod non adminiſtraret ſub Conditione, ſed ſub modo, facta diſpoſitione quod liberè adminiſtret bona relicta, donec permanſerit vidua.* (*z*) L. legatum ff. de annuis leg. Præpoſ. in c. verum. de Condic. appoſ. extra. n. 1. & 9. (*a*) Geneſ. c. 2. verſ. 24. Math. c. 19. verſ. 6. DD. in d. c. ultim. de cond. appoſ. extra. (*b*) *Imo rejicitur modus contra ſubſtantiam actus, conſetur quod actus omnino validus* L. cum precario ff. de precar. & in c. ultim. de precar.

this word [*Donec*] ſhould ſignifie a perpetuity of time, if we will liſten unto the Divines, upon theſe and the like Caſes [*Donec ponam inimicos tuos Scabellum pedum tuorum* (*c*), until I make thine Enemies thy Foot-ſtool; *Donec peperit primogenitum filium*, until ſhe brought forth her firſt begotten Son, &c.] (*d*) Moreover ſuppoſe the Contract were not *Modal*, but *Conditional* (*e*), the differences whereof I have deciphered in my Treatiſe of Teſtaments (*f*); Yet may it be objected, foraſmuch as this Condition is not ſuſpenſive, but reſolutive or extinctive (*g*), that is to ſay, not hindering the nativity or birth of the Bond or Obligation, but threatning a death or deſtruction to that which is born (*h*); foraſmuch alſo as *privatio præſupponit habitum* (*i*), as the Logicians teach us (*k*), therefore this reſolutive or extinctive Condition doth preſuppoſe a former Act; and ſuch an Act as is to continue, [*donec*, *until*] the Condition be extant (*l*), which if it never happen, then remaineth the Contract ever firm and good (*m*): So that whether the Contract be *Modal* or *Conditional*, it ſtill returneth to this end, that it is not a void Contract (*n*). To both theſe Objections one anſwer might ſuffice, namely, That whether we imagine the Contract to be *Modal* or *Conditional* it is not material; for as *Conditio* doth deſtroy the Contract when it is againſt the Subſtance of Matrimony, (as is before confirmed), even ſo doth *Modus*; So writeth *Silveſter Prierius* (*o*), in theſe Terms. *Idem*

(*c*) Pſal. 109. 1. 2. Epiſt. ad Heb. c. 1. 13. d. Hieron. contra Jovinianum. lib. 1. circa prin.

(*d*) Matth. c. 1. in fin. Hyeron. ubi ſupra. Zaſ. in L. centiſſimus. §. ultim. n. 10. ff. de verb. oblig.

(*e*) L. pater ſeverinam. §. ultim. ff. de cond. & demon. Bart. in L. 1. cod. Tit.

(*f*) fol. 137. n. 5.

(*g*) Præpoſ. in c. ultim. de cond. appoſ. extra. n. 3. Paul. de Caſtr. in L. ſufficit ff. de Cond. indeb. n. 5. & ibi Jaſ. n. 5, & 6.

(*h*) Paul. de Caſtr. ubi ſupra. Cardinal. in c. verum de Condic. app. extra. Bar. in L. 1. ff. de cond. & demon. n. 15. Tiraquel. de retract. Conventional. §. 2. gloſſ. 1. n. 74. fol. 343. *ubi apertiſſimè docet, quòd Conditio reſolutiva non ſuſpendit actum, nec eum facit conditionalem, ſed tantum ex eventu eum reſolvit, qui interim judicatur purus.* (*i*). L. decem ff. de verb. oblig. & l. manumiſſiones. de juſtit. & jur. ff. (*k*) Everard. loco à privatione. & Olden. Topic. legal. (*l*) L. 2. ff. de in diem addict. cum gloſſ. Paul. & Jaſ. in d. L. ſufficit. Tiraquel. de Retract. conventionel. fol. 347. n. 74. Dec. & Cagnol. in L. is damnum. §. quod pendet. de Reg. Jur. ff. (*m*) L. 1. & 2. de in diem addic. ff. & ibi gloſſ. (*n*) *per ea quæ ſuperius tradita ſunt, quibus adde* Panor. in c. 1. de cond. app. extra. n. 2. ubi Poſt. Antho. dicit, *quod ſi contraho Matrimonium tecum, & ſi non donaveris mihi Centum, volo te reliquere; Centum nunquam dabis, Matrimonium, quod à principio tenuit, non poteſt diſſolvi* (*o*) Priſc. in ſuâ ſummâ verb. Matrimonium. §. 3. n. 12. Accedit Covar. tract. de Sponſal. Secunda parte c. 3. §. 1. n. 8.

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de Modo dicendum, quod de Conditione, & ſecundum eandem diſtinctionem; Nam ſi eſt contra jus Matrimonij, & apponitur in ipſo Contractu, vitiat Contractum, &c. The ſame thing is to be ſpoken of the Mean, which is ſpoken of the Condition, and according to the ſame diſtinction; for it be againſt the Law of Matrimony, and be put in the Contract it ſelf, it deſtroyeth the Contract; To whom I may joyn *Covaruvias* writing thus; *Non tantum per Conditionem contra Subſtantiam Matrimonij vitiatur ipſe Contractus, Sed etiam per Modum Contractus adjectum*; Not only by a Condition againſt the Subſtance of Matrimony, is the Contract deſtroyed, but alſo by a Mean adjoyning to the Contract (*p*): But to anſwer to either Objection ſeverally; where it is ſaid, that the Contract which is made *Sub modo*, is forthwith to take effect; and ſo to continue until that quality be extant (*q*): That is not true in caſe this *Modus*, wherewith the Contract is interrupted, be againſt the Subſtance of the Act (*r*); Indeed if a Man and a Woman contract Matrimony *Sub modo*, which is not againſt the Subſtance of Matrimony, nor unhoneſt, nor unlawful, [*As that he ſhall give her* 100 *l. at ſuch a day*], though he do not give her the Sum promiſed at the time appointed, yet is not the Matrimony diſſolved (*s*); but it is otherwiſe in other Contracts (*t*); and in teſtamentary diſpoſitions (*u*), from whence theſe objected Arguments being deduced, prove nothing againſt our former aſſertion (*x*): And whereas it is further objected, that this Condition being reſolu-

(*p*) Covar. tract. de Sponſal. ſecunda parte c. 3. §. 1. n. 7.

(*q*) L. legatum. de an. leg. ff. Zaſ. in l. centeſimus. §. ultim. de verb. ob. ff. n. 8, & 9. Addic. ad Summam Hoſtienſin Rub. de condic. appoſ. §. quæ conditio in fin.

(*r*) Prier. verb. Matrimonium. §. 3. q. 12. c. ultim. de cond. app. extra. Covar. tract. de Sponſal. 2. parte. c. 3. §. 1. n. 8.

(*s*) Prier. ubi ſupra. Summa Roſella. verb. Matrimonium. el. 5. verſic. *quæ eſt differentia, Idemque Juris eſt, ſi ſub Conditione reſolutivâ Matrimonium ſit contractum.* Panor. in c. 1. de cond. appoſ. extra. n. 2.

(*t*) L. 1. & 2. ff. de addict. in diem. (*u*) L. pater Severinam. §. ultim. ff. de cond. & demon. (*x*) *Ex ſeparatis non infertur.* L. ultim. ff. de Calum. L. neque natales C. de probac. Everard. loco à ſeparatis.

tive, doth preſuppoſe a former Act (*y*), like as *privatio præſupponit habitum* (*z*). I anſwer that a Condition reſolutive (properly ſo called) doth preſuppoſe a former Act (*a*), in which Caſe the Contract is ſaid to be, *purus in Capite, conditionalis in Caudâ* (*b*), pure or ſimple in the Head, conditional in the Tail: But in our Caſe the Condition is not properly reſolutive; and therefore doth not work any ſuch Suppoſals, which thing appeareth by *Panormitan* in theſe words, *Notabis, Quod Conditio contra Subſtantiam Matrimonii Contractum impedit, non ſolum quando eſt Suſpenſiva, ſed etiam Reſolutiva, licet aliqui (ſed malè) hæc non animadvertentes putarant quòd ex quo ſemel Matrimonium tenuit, Conditio reſolvens debet haberi pro non adjecta, quod eſt falſum; Nam dico quòd nunquam fuit Matrimonium, & ſic proprie non poteſt dici Conditio reſolutiva* (*c*). Thou ſhalt note, that a Condition againſt the ſubſtance of Matrimony doth hinder the Contract, not only when it is Suſpenſive, but alſo when it is Reſolutive, although ſome Men (but wrongfully) not marking it, that ſince the Matrimony once held, this reſolving Condition ought to be accompted for rejected, which is falſe; for I ſay, that there was never Matrimony, and ſo the Condition cannot properly be termed reſolutive.

34. To conclude therefore whether the Condition be againſt the firſt good of Matrimony, as [*if thou ſhalt avoid generation of Children*], or againſt the ſecond good [*as if thou ſhalt play the Adultereſs*], or againſt the third good, as [*if I ſhall not find a better*, or *until I find a better*], In every of theſe Caſes (the former objections notwithſtanding) the Contract is utterly void, and of none effect (*d*), except as followeth after the Ampliations of this Rule, which Ampliations are theſe.

(*y*) Paul. de Caſtr. & Jaſ. in L. ſufficit ff. de cond. indeb. Præpoſ. in c. ultim. de condic. app. extra. n 3.

(*z*) L. decem. ff. de verb. obligi. Everard. loco à privatione.

(*a*) DD. in L. pecuniam quam. ff. ſi cer. pet. Tiraquel. de retract. Novel. fol. 343. n. 74. Panor. in c. ultim. de cond. appoſ. extra.

(*b*) DD. in L. centeſſimus §. ultim. præſertim. Zaſ. de verb. oblig. ff.

(*c*) Panor. in c. ultim. de condic. appoſ. extra. n. 2.

(*d*) Textus eſt apertiſſimus in c. ultim. de condic. appoſ. extra. prima parte. Adde c. ſolet. & c. aliquando. 32. q. 2.

35. The

35. The first Ampliation is collected out of the last Objection, that is, whether the Condition be suspensive or resolutive; yet resisting the *Substance* of Matrimony, it overthroweth the Contract (*e*).

36. The second Ampliation flowing from the same Fountain is this; Whether the Contract be conditional or modal, yet being against the *Substance* of Matrimony it is utterly void and frustrate (*f*).

37. The third Ampliation is, That albeit the Parties thus contracted should know each other Carnally, yet should the Contract still remain destitute of legal force and virtue (*g*).

38. The fourth Ampliation is, That albeit the Resolutive Condition be neither unhonest or unreasonable; yet fighting with the *Substance* of the Act, it doth mortally wound the Contract without hope of recovery (*h*). For Example; A Man contracteth Matrimony with a Woman conditionally [*If she shall live honestly*, or *If she do never commit Adultery*,] whereunto the Woman expresly giveth her Consent. In this Case, howsoever this Resolutive Condition seem very honest and very reasonable, yet because it doth so mightily fight with the perpetuity or third good of Matrimony, which is *individuum vinculum*, by the received Judgment of all the Interpreters (almost) of the Laws Ecclesiastical, the Contract is dead in Law (*i*); insomuch that if the Parties so contracted should lye together, and Carnally deal together, yet could not this Conjunction preserve the life, or give any strength to the aforesaid Contract (*k*). This verily is the Judgment of most Writers in this Case, which also they have generally delivered for a singular and memorable *Cautele*, whereby any Man (if peradventure he were urged to contract Matrimony with any Woman against his liking) might not only seem to contract Matrimony with her, but also indeed lye with her, and

(*e*) c. ultim. de condic. appos. extra. & ibi DD.

(*f*) Covar. Tract. de Sponsal. secunda parte, c. 3. §. 1. n. 7. Silvestr. verb. Matrimonium. §. 3. q. 12.

(*g*) Henr. Boic. & Panor. in c. ultim. de Sponsal. extra. Covar. de Sponsal. secunda parte, cap. 3. §. 1. nu. 12. & 16.

(*h*) Hyppol. de Marsil. Singular. 286. Panor. & Covar. ubi supra. Bombin. consil. 35. Aretin. consil. 82.

(*i*) Panor. Hyppol. Bombin. & Aretin. ubi supra. Covar. Tract. de Sponsal. secunda parte, c. 3. §. 1. n. 10. Cardinal. & Præpos. in c. 1. de cond. appos. extra.

(*k*) Panor. & DD. in c. ultim. de cond. appos. extra. Hyppol. Singul. 286.

and yet nevertheleſs be at freedom, and diſappoint them of their purpoſe, who urged him againſt his Will (*l*). And one *Petrus Gerardus de Petrâ Sanctâ*, doth confirm it with a pretty Hiſtory to this effect (*m*): Whiles *Gerardus* was Student at *Bononia*, a freſh Scholar there, a tall and ſtreight Stripling, of a Sanguine Complexion, ſpringing towards the Age of Twenty years, whoſe Parentage was neither baſe nor poor, having more delight to be abroad in the City, than to be ſhut up within a ſolitary Study, more deſirous to behold the fair Faces of beautiful Virgins, than to pore upon an unpleaſant Book, or to be acquainted with ſuch as *Bartolus* and *Baldus*, and carrying a greater Zeal to examin and try the ſharpneſs of Womens wits, with ſome pleaſant parley, than to be urged with ſubtle Arguments, or oppoſed with ſerious Diſputations in the Schools: And finally, eſteeming it in thoſe days (which none doth in theſe days, neither in *Oxford* nor *Cambridge*, nor in the Inns of Courts) a far greater bleſſedneſs ſecretly to kiſs the Civil Text of Womens Lips, than publickly to frequent the Solemn Lectures of Profound Doctors, interpreting whatſoever Text either Civil or Divine: This gallant Youth, whoſe Purſe was as well furniſhed with Tempting Angels, as his Head fraught with pleaſant Conceits, often recreating his unwearied Wits, and daily refreſhing his untired Senſes, after he had taken a diligent Survey of all the whole Army of the amiable Amazons of *Bononia*, eſpied one Virgin amongſt others, whoſe excellent Beauty, fine Complexion, courteous Conditions, womanly Modeſty, ſeemly Grace, and other Vertues of Body and Mind, were ſuch, as for the ſame ſhe was worthily preferred before the reſt, albeit they in reſpect of Wealth, Honour and Friendſhip, were to be preferred before her (ſo adverſe is Fortune to Nature;) Well noteth this Scholar all her Perfections of Nature,

l) Hyppol. d. Singul. 286. *fatetur ſe hanc Cautelam primum ab* Anto. de Burges *Hiſpano didiciſſe, quam etiam pluribus extollit Laudibus, veruntamen hujuſmodi Cautelæ uſus, non paſſim eſt probandus, ſed tum demum, quum quis opprimitur injuriâ, inquit* Covar. Tract. de Sponſal. ſecunda parte, c. 3. §. 1. 16.

(*m*) Gerard. Singular. 21.

Nature, and all her wants of Fortune; by the one he is inflamed to Love, by the other he is in hope to ſpeed: Forward therefore he proceedeth, ſparing neither Vows nor Gifts, whether to obtain Marriage, or but to reap the only Fruits thereof, let the Sequel ſhew; but whether this or that it skilleth not; for ſo perſwaſive was his Eloquence, as the ſimple Maid miſtruſted not, and of ſuch force were his Gifts, as the poor Soul miſliked not: Nevertheleſs, leſt ſhe might ſeem too credulous to believe all that he ſpoke, or too amorous to grant all that he deſired; to prevent the one, ſhe tried her womanly wit with his Scholarly skill, oppoſing to his fair Promiſes many grievous Perils; and to avoid the other, ſhe ſhewed no want of maidenly modeſty, by often denying his earneſt Demands, preferring that one Jewel, which he ſo deſired, before all the Jewels which he had beſtowed: In no wiſe therefore would ſhe yield, and yet would ſhe be conquered in any wiſe: He perceives and purſues, attending only for opportunity: During which time, her aged and long-experienced Parents, underſtanding the raſh Reſolutions of the young Couple, did ſee, but would not ſee the ſame, intending indeed by this Bait of their Daughters Beauty to catch the Youth in his own Net, and to force him to marry her, and maintain them. They therefore make fair weather, inviting him to their Houſe very friendly, and there entertaining him very civilly. And long it was not, till by the ſubtilty of the expert Parents, an opportunity was offered to theſe fervent Lovers, to have accompliſhed what they long deſired. The Scholar thought verily that now he had got Fortune by the Forehead. But when they were alone, and ſafe together (as they thought) ſuddenly her vigilant Parents, with a multitude of Kinsfolks, ruſh upon them, threatning even to kill the Scholar, unleſs he would preſently marry their Daugh-

Daughter. Judge you in what a quandary my young Maſter now ſtood, ſeeing himſelf thus entrapped, and brought to this *Dilemma*, either to marry a Woman of poor and baſe Kindred, or elſe to hazard the loſs of his own life. In vain doth he now wiſh, that he had been faſt at his Book; In vain doth he now repent him, that he preferred Pleaſure before Study; and in vain did he oft and earneſtly crave a further time to anſwer; but they were peremptory: Wherefore ſeeing no other Remedy, he willed them to ſend for a Notary, promiſing that before his departure he would contract Matrimony with their Daughter, which pacified them for the time; and in the mean time, with all ſpeed, he diſpatched a ſecret Meſſenger to an old Doctor his Tutor, to whom the Caſe being imparted, he craveth his Counſel, in making ſuch a Contract as might ſatisfie the Parents, but not bind himſelf. The Tutor adviſeth his Pupil to contract Matrimony conditionally, [*If ſhe ſhall live honeſtly,*] or [*If ſhe ſhall not do with another as ſhe ſhe had done with him,*] or under ſome like Reſolutive Condition. The Scholar upon the return of the Meſſenger, and the receipt of this Anſwer, he was adverti-ſed; wherewith, not only the Party herſelf, but the Parents alſo were well appaied, thinking the Condition to be both reaſonable and lawful. Which done, the Scholar eſcaped joyfully, thanked his Tutor heartily, and thence forward applyed his Study more diligently. The covetous Parents, who thought they had been ſure of a rich Son in Law, after they had conſulted with others, perceived that they were deceived. The young Woman, who lately was a Virgin, remained very ſorrowful, not ſo much for the loſs of that which could not be recovered, as for the loſs of her new ſuppoſed Husband. Thus whether we reſpect Hiſtories or Authorities, we may perceive how all the Interpreters, with

with one common Consent, conspire in this, That albeit the Condition do seem *reasonable* and *honest*, yet being Resolutive, it doth utterly destroy the Contract of Matrimony wherewith it is mixed. Only one Writer (*u*) (of all that I have read) doth run a contrary Course, affirming that this Condition [*Si honestè vixeris*, *If thou shalt live honestly*; *Si non mœchaberis*, *If thou wilt not commit Adultery*] is a secret Condition, such as, were it not expressed, is secretly understood, and therefore that the Contract is not thereby made Conditional, but that the same is *pure* and *simple*, as if no such Condition had ever been expressed (*o*). Howbeit, I do not see how it may be justified, that these be secret Conditions: For albeit to live honestly, and not to commit Adultery, be one of the *ends* for which Matrimony was instituted, and so always understood and secretly promised, though it were not expressed in the Matrimonial Contract (*p*), yet that this formal Promise is understood as a *Condition*, (that is to say) that if either party should live unhonestly by committing Adultery, the Matrimony were thereupon *ipso facto* dissolved (*q*), (for such is the nature of a Condition) doth not follow (*r*): Of which Question nevertheless, and whether for Adultery Matrimony be dissolved *à vinculo*, or only *à mensa & thoro*, we shall hereafter discourse more fully: But in the mean time, I dare not trust to this one Man's opinion alone, especially against so many. Again, if it were granted, That this Condition [*Si honestè vixeris*, *If thou shalt live honestly*,] is *tacita Conditio*, a secret Condition, Doth it therefore follow that the Contract wherein this secret Condition is expressed, is pure and simple, as if

(*u*) Melchior. Kling. Tract. de causis matrimonial, fol. 75.

(*o*) Arg. l. Conditiones extrinsecus. ff. de cond. & demon. L. non recte. C. de fide juss.

(*p*) c. nuptiarum. 27. q. 1. c. omne. 27. q. 2. Præpos. in c. ultim. de cond. appos. extra. n. 3. Silva nuptialis, fol. (mihi) 135. nu. 9.

(*q*) *Nam deficiente Conditione, ipso jure corruit dispositio, tam inter vivos quam in ultimis voluntatibus.* Tiraquel in rep. L. si unquam. C. de rev. voc. donec. n. 47. *quo casu non opus est Judice*, Summâ Bald. in L. 1. C.

de secund. nup. Cardinal. in Clem. 1. de pœnis, vel sufficit declaratoria.

(*r*) *Topicus namque locus à fine, tenet solum in bono & malo, inquit* Jo. Casus Oxon. in suâ Summâ dialect. fol. 239.

it had not been expreſſed (*s*); Is not that alſo very doubtful? I refer thee to that I have written of the Nature of ſecret Conditions (*t*). Indeed Spouſals *de futuro* may be contracted under this reſolutive Condition, [*If thou ſhalt live honeſtly, &c.* (*u*)], becauſe it is certain that ſuch Spouſals may be diſſolved for Fornication, albeit the Contract were pure and ſimple, without mention of the former Condition (*x*); much more when this Condition [*If thou ſhalt live honeſtly, If thou ſhalt not commit Adultery* (*y*)] is expreſſed, unleſs the Parties ſo eſpouſed do firſt know each other Carnally, for then it is all one as if they had ſimply contracted Matrimony (*z*), which, as I ſaid, is not utterly diſſolved for Adultery (*a*): Moreover, if the Matrimony were ſeparable even *à vinculo* in Caſe of Adultery (as ſome do hold (*b*),) yet who dare ſay that in that Caſe it is diſſolved *ipſo facto* (*c*): For what if the Party innocent will remit the Fault, and continue the Band of Matrimony (*d*); nay, the Innocent may not only ſo do, but is ſeverely to be admoniſhed thereunto (*e*): Wherefore this Condition [*If thou ſhalt live honeſtly*, or *If thou ſhalt not commit Adultery*,] is not a ſecret Condition, ſuch as is neceſſarily underſtood in every Matrimonial Contract (inaſmuch as Matrimony may conſiſt, and not be diſſolved, the Condition being infringed) but rather a Condition againſt the Subſtance of Matrimony, (inaſmuch as it is oppoſite to the *perpetuity* of Marri-

(*s*) *Nec ipſo Jure diſſolvi Matrimonium propter Adulterium ſed expectandum eſſe Eccleſiæ Judicium, etiamſi Crimen ſit notorium, Communis eſt Doctorum opinio.* in c. porro. de divortiis extra. Moraldus Tract. de Matrimonio, fol. 98. *qui tum aliter ſentit, ſi Cauſa ſit notoria.* Gloſſ. in c. unic. §. ultim. de deſponſ. impub. lib. 6.

(*t*) ſupra. eod. §.

(*u*) *Et ita fortaſſe voluit ipſe* Melchior. Kling. loco præd. dum ſcripſit, *Si contrahentes ita dicunt, promitto tibi nuptias ſi honeſtè vixeris, non habetur pro conditione, &c. quæ verba (ſi verum amemus) Sponſalia potiùs quam Matrimonium denotant.*

Goden. lib. 2. conſil. matrimonial. conſil. ibidem 2. n. 6. (*x*) c. quemadmodum, de Jure jur. extra. §. Ita ſi quis. (*y*) c. de illis. de condic. appoſ. extra. (*z*) d. c. de illis. c. is qui fidem. de Sponſ. extra. & DD. ibidem. (*a*) *Intelligas velim hoc procedere jure tantùm Canonico, quo propter Adulterij delictum ſeparatur quidem Matrimonium, non à vinculo, ſed à menſâ & thoro tantum.* Panor. in c. ex literis. de divor. extr. n. 5. & omnes Canoniſtæ ibidem. (*b*) de quibus Schneidwin. Tract. de nuptiis, fol. 50. cum ſeq. Weſenbec. in Tit. de divortiis & repud. ff. (*c*) *Sancitum enim fuit in conſil.* Carthaginenſi (*cui interfuit* Auguſtinus) *ut nullus conjugatus uxorem dimitteret, niſi probatâ priùs apud Epiſcopum Cauſa.* c. Seculares. 33. q. 2. c. porro. de divortiis extra. (*d*) c ſuper eo. de hæretic. in Sext. Menoch. de præſump. l. 3. præſump. 1. n. 19, 20. Schneidwin. de nuptiis, fol. 52. *Sed tamen improbè Neptunum accuſat, qui iterum Naufragium facit.* (*e*) Schneidwin. ubi ſupra. vide infra.

age)

age) and therefore doth overthrow the Contract of Matrimony whereunto it is joyned, accordingly as is aforesaid (*f*).

39. The first Limitation of the former Rule (*viz.*) That a Condition against the Substance of Matrimony doth make void the Contract (*g*), is when the other Party doth directly dissent or gain-say the same Condition, consenting only to the Contract without the Condition (*h*); for in this Case the Contract is good, and shall prevail as Spousals (*i*), which by Carnal Copulation become true and perfect Matrimony (*k*).

40. The second Limitation is when the other Party doth neither expresly dissent nor consent to the said Condition (yielding Consent to the Contract only); for unless both the Parties do yield to the *Condition* the Contract is not utterly overthrown: So that the Silence of the one Party doth work the same effect in this Case, which manifest Contradiction did in the former (*l*).

41. The third Limitation is when as the Parties do first Contract Matrimony, and then the Contract being perfect, add a Condition against the Substance of the Act; for then, albeit both Parties do expresly give their mutual Consents to this Condition, yet doth it not hurt the former perfect Contract (*m*).

42. Unhonest Conditions, which be not against the Substance of Matrimony, do not hinder the validity of the Contract of Spousals or Matrimony, whereunto they be joyned (*n*), but are reputed for rejected, and that in favour of Matrimony (*o*), for it is otherwise in other Contracts by the Civil Law (*p*); and therefore if

(*f*) Panor. in c. ultim. de condic. appos. extra. Gerard. Sing. 21. Hyppol. Sing. 286.

(*g*) c. ultim. de condic. appos. extra.

(*h*) 32. q. 2. c. aliquando. Innoc. Henr. Boic. & alii in c. ultim. de cond. appos. extra.

(*i*) Hostiens. Panor. Præpos. & alii in c. ultim. de cond. appos. extr. *quorum opinio communis est.* Teste Covar. Tract. de Sponsal. secunda parte, c. 3. §. 1. n. 11. *quam & ipse ibidem confirmat adversus* Adr. in 4. q. 9.

(*k*) iid. ubi infra.

(*l*) Inno. Boic. Hostiens. Cardinal. & Præpos. in c. ultim. de cond. appos. extra.

(*m*) Præpos. in d. c. ultim. de condic. app. facit L. per Servum. §. 1. cum L. seq. ff. *de usu & hab. ubi distinguitur an in eadem oratione vel diversâ adjiciatur Conditio, vel modus, contra Substantiam Actus.*

(*n*) c. ultim. de cond. appos. extra. secunda parte. Præpos. in c. 1. de Sponsa. duorum. extra. n. 4. ubi refert quod communi DD. opin. text. d. c. ultim. *qui loquitur in Matrimonio extenditur ad Sponsalia.*

(*o*) DD. in d. c. ultim. Covar. Tract. de Sponsal. secunda parte, c. 3. §. 1. n. 1. & 2.

(*p*) L. impossibilis ff. de verb. oblig. §. Si impossibilis. Instit. de mutil. stipul.

a Man and a Woman do contract Spouſals or Matrimony together, conditionally if he or ſhe ſhall commit Theft or Murder, this Condition is rejected, and the Contract pure and ſimple (*q*); Nevertheleſs, it is not perpetually true that the unhoneſt Condition is rejected in Matrimonial Contracts; for if the Parties do believe the ſame condition to be honeſt (*r*), or if the unhoneſt Condition be only of a thing paſt or preſent, and not future (*s*); or when the Parties do expreſly covenant not to conſent, unleſs that unhoneſt Condition be accompliſhed (*t*), in theſe Caſes the Condition is not rejected, but maketh void the Contract.

(*q*) Summa Hoſtienſ. in Rub. de condic. appoſ. §. quæ conditio. Melchior. Kling. Tract. de cauſ. Matrim. fol. 76. Covar. tract. de deſponſ. ſecunda parte c. 3. §. 2. in prin. per d.c. fin. de cond. app. extra.

(*r*) Covar. Tract. de cauſ. Matrimonial. ſecunda parte. c. 3. §. 2. n. 16. (*s*) Idem Covar. d. §. 2. n. 2.

(*t*) Hadrian. in 4. de Matrimonio. q. 6. & Covar. d. §. 2. n. 5.

43. What if a Man contract Matrimony or Spouſals with a Woman conditionally, *If ſhe ſhall ſuffer him to have the uſe of her Body carnally*, or *to beget her with Child*, Whether is this Contract pure and ſimple or conditional (*u*)? Divers hold, that whether the Parties do mean of unhoneſt and adulterous Copulation, or of Matrimonial Conjunction, the Contract is ſtill pure and ſimple (*x*): In the former Caſe it is pure and ſimple (ſay they), becauſe unhoneſt Conditions are rejected from the Contract, when they be not againſt the *Subſtance* thereof (*y*); and in the ſecond Caſe much more is the Contract pure and ſimple, becauſe Matrimonial Copulation is a ſecret Condition neceſſarily underſtood (*z*); and to that end eſpecially is Matrimony contracted (*a*); Others make difference, whether Matrimony be contracted under the foreſaid Conditions or Spouſals only (*b*): When Matrimony is contracted under the foreſaid Conditions,

(*u*) De hac L. vide gloſſ. & Doctores in c. 1. de Sponſ. duorum extra.

(*x*) Gloſſ. in c. 1. de Sponſ. duorum extra. verb. ſi Permiſerit. in princ.

(*y*) Gloſſ. in d.c. 1. per. c. ultim. de condic. appoſ. extra. Boer. conſil. 40. n. 128. Panor. in d.c. 1. n. 6.

(*z*) Gloſſ. præall. & Præpoſ. in d. c. 1. de Sponſ. duorum n. 4. (*a*) §. cum ergo. 27. q. 2. Præpoſ. ubi ſupra. (*b*) Prier. in Summa quæ dicitur, Silveſtrin. verb. Matrimonium. cl. 3. q. 7. Cardinal. in c. 1. de Sponſ. duorum extra. q. 1. verſic. in propoſito.

As

As [*I do take thee to my Wife, if thou ſhalt ſuffer me, &c.*] then is the Contract pure and ſimple (*c*); And theſe words [*if thou ſhalt ſuffer me, &c.*] are to be underſtood cauſative, or as though the Party had ſaid [*becauſe thou ſhalt ſuffer me, &c.* (*d*):] When Spouſals are contracted under the Condition aforeſaid, as [*I will take thee to my Wife*, or *I will contract Matrimony if thou ſhalt permit me, &c.*] Then if the Parties did mean of an unlawful Conjunction, the Condition by the Opinion of divers (*e*) is rejected; and ſo in effect, as if they had contracted Spouſals ſimply (*f*): But if they did not mean of any unlawful Conjunction, then is the Contract conditional, and is ſuſpended until the Condition be accompliſhed (*g*). If it do not appear whether the Parties did mean of a lawful or unlawful Conjunction, for the avoiding of Sin the Law preſumeth they meant honeſtly (*h*); whereby the Contract is made conditional, and is ſuſpended (as is aforeſaid) until the Condition be performed (*i*), which Condition being once performed, it is a queſtion whether theſe Spouſals remain Spouſals, or they do paſs from Spouſals into Matrimony (*k*); Wherein ſome affirm that they be no more than Spouſals ſtill (*l*): And although the Condition be now accompliſhed, whereby the Spou-

(*c*) Cardinal. in c. 1. de Sponſ. duorum extra. q. 1. verb. in propoſito, *quod verum exiſtimo ſive de fornicario Coitu ſit intelligend*, *quo Coitu rejicitur conditio, utpote turpis & inhoneſta, & ſic erit Matrimonium, vel ante copulam.* Clavaſ. in Summa Angelicâ verb. Matrimonium impediment. 3. n. 9. ſive de Matrimoniali Coitu, *& tunc ex ipſo partium Conſenſu in hujuſmodi Copulâ ſtatim efficitur Matrimonium, ponderando verba, inquit* Cardinal. ubi ſupra.

(*d*) Tancred. in c. 1. de Sponſ. duorum extra. de quo ibidem gloſſ. & Præpoſ. n. 4. (*e*) Silveſtr. Prier. verb. Matrimonium §. 3. q. 7. verb. mihi autem, &c. & Boer. conſil. 40. n. 128. Panor. Poſt. gloſſ. in c. 1. de Sponſa. duorum. n. 6. & ibi Cardinal. q. 1. in fin. *Quod tamen non placet omnibus, & fortaſſe communis eſt opinio, quod iſta verba (Si permiſerit ſe cognoſci) tum demum Conditionem faciunt, quando de fornicario Coitu intelligantur, nempe quando Conditio aliter exprimatur quam ineſt.* Vide Præpoſ. in d. c. 1. n. 6. & Melchior Kling. Tract. de cauſ. Matrimonial. fol. 75. in fin. (*f*) c. ultim de Sponſ. extra. (*g*) Cardinal. in d. c. 1. de Sponſ. duorum op. ſecunda in fin. Prier. verb. Matrimonium §. 3. q. 7. verſ. *Si vero ſit honeſta. Contrarium tamen tenet* Præpoſ. in d. c. 1. n. 4. *Ubi dicit hanc Conditionem nihil operari quia non aliter exprimitur quam ineſt.* (*h*) Covar. Tract. de Sponſal. ſecunda parte. c. 3. §. 2. in fin. Præpoſ. in c. 1. de Sponſ. duorum n. 5. verb. In contrariam. (*i*) Cardinal. in c. 1. de Sponſ. duorum. op. ſecunda. in fin. Prier. verb. Matrimonium §. 3. q. 7. (*k*) de quâ q. DD. in c. 1. de Sponſ. duorum extra. (*l*) Vincen. in d. c. 1. de Sponſ. duorum extra. & poſt eum Jo. And. ibidem. Silveſtr. Prier. verb. Matrimonium §. 3. q. 7. verſic. Si verò ſit honeſta.

ſals,

ſals, which before ſuch accompliſhment were conditional, are now purified, and as it were without Condition (*m*); Yet this removing of the Condition hath no further force, ſave only to make that ſimple, which before was conditional: So that whereas theſe Spouſals were at firſt conditional, the Condition being removed, they become of Conditional Spouſals, ſimple Spouſals (*n*), but yet Spouſals ſtill, not Matrimony (*o*). Like as when two Parties contract Spouſals conditionally, by promiſing that they will Marry together, if their Parents ſhall conſent (*p*), the Parties conſenting, it is no more than if they had promiſed ſimply to Marry (*q*), which promiſe of future Marriage (albeit ſimple and without Condition), doth import no more but Spouſals (*r*): Nevertheleſs it is confeſſed by the Authors of this Opinion, that if the Parties contracting Spouſals conditionally, [*If ſhe ſhall ſuffer him to have the uſe of her Body*] proceed to the ſecond Act of Generation, then, as by the firſt Act the conditional Spouſals are made ſimple, ſo by the ſecond Act, theſe ſimple Spouſals are tranſlated into Matrimony (*s*); Others (whoſe Opinion is more commonly received) do affirm, that even by the perfection of the firſt Act of generation, the foreſaid Spouſals are not only purified from the foreſaid Condition, but are alſo turned into Matrimony (*t*). Whoſe reaſon is, that foraſmuch as the Parties did mean of an honeſt and lawful Copulation, they did thereby intend a Matrimonial Conſummation; and conſequently by the accompliſhment of that intended Condition, the aforeſaid Spouſals became Matrimony (*u*), none otherwiſe than when two Parties

(*m*) c. de illis. & c. ſuper eo. de cond. appoſ. extra. & ibi DD. & in c. fraternitatis. de frigid. & malefic.

(*n*) d. c. de illis.

(*o*) Unicen. & Jo. And. in d. c. 1. de Sponſ. duorum.

(*p*) Contrahunt. namque ſub conditione ſponſalia, etiam *de futuro* c. de illis de cond. appoſ. & ibi Panor. n. 2.

(*q*) Panor. in d. c. de illis.

(*r*) L. 1. de Sponſal. ff.

(*s*) Unicen. Jo. And. & alii in c. 1. de Sponſ. duorum. Henr. Boic. in c. ultim. de cond. appoſ. in fin.

(*t*) Præpoſ. in c. 1. de Sponſ. duorum extra. n. 5. verb. in contrarium. Covar. Tract. de Sponſ. 2 parte c. 3. §. 2. n. 13. Summa Roſella verb. Matrimonium. el. 5. verſic. *Quod ſi quis contraxit*, &c. Melch. Kling. Tract. de cauſ. Matrimonial. fol. 75. in fin.

(*u*) Covar. tract. de Sponſal. ſecundâ parte. c. 3. §. 2. in fin. Cardin. in c. 1. de Sponſ. duorum. Summa Roſella ubi ſupra.

con-

contracting Spouſals conditionally, *viz.* That they will Marry, if their Parents will conſent; and dealing together Carnally before the accompliſhment of the Condition, are not only ſaid to have thereby renounced the Condition, but alſo in the ſame moment to have tranſlated the ſame Spouſals into Matrimony (*x*); And ſo I take it to be, when as the Parties do contract Spouſals in this form, [*If thou wilt permit me to have the uſe of thy Body, I will Marry thee, if ever I Marry* (*y*)], that is to ſay, if the Parties meant unhoneſtly the Condition is rejected, if honeſtly the Contract is ſuſpended, but the Condition being once accompliſhed, the Spouſals are not only purified, but turned into Matrimony (*z*). But if the Contract be made in this wiſe *If thou wilt ſuffer me, I will never forſake thee*] albeit ſhe do ſuffer him, yet thereby neither Matrimony, neither Spouſals are contracted or confirmed (*a*); for albeit the Condition being accompliſhed, the Contract ſeemeth to be purified, or as though no Condition had been expreſſed (*b*); Yet this admitted, it relieveth not, becauſe theſe words [*I will never forſake thee*], being uttered ſimply, or without any Condition, infer neither Matrimony nor Spouſals (*c*), becauſe they be meer negative; And therefore, unles it may appear by ſome other Conjectures, that the Parties did thereby intend to contract Matrimony or Spouſals, it is as if the Parties had not ſpoken any words at all (*d*); Or if the Contract be conceived alternatively in theſe Terms [*If thou ſhalt ſuffer me, &c. I will take thee to my Wife,* or *I will give thee* 100 *l.* (*e*)] though ſhe do ſuffer him, yet is it in his Choice (by the received Opinion) whether

(*x*) DD. & præſertim. Panor. & Præpoſ. in c. de illis de cond. appoſ. extra.

(*y*) Summa Angel. verb. Matrimonium. impediment. 3. n. 9. Addic. ad Hoſtienſ. Summa. in Rub. de condic. appoſ. §. quæ conditio. in fin. Summa Roſell. verb. Matrimonium el. 5. verſic. quid ſi quis contrahat. in fin.

(*z*) ibidem.

(*a*) Baptiſta in Summa Roſella. verb. Matrimonium el. 5. verb. quid. ſi dicat. Silveſtr. Prier. verb. Matrimonium el. 2. q. 13. facit. Covar. Tract. de Sponſal. c. 4. §. 1. n. 3. in fin.

(*b*) c. de illis. & c. ſuper eo. de condic. appoſ. extra. & DD. ibidem.

(*c*) Baptiſta & Silveſter. poſt. Monald. ubi ſupra. (*d*) Iidem ibidem, quibus adde Covar. Tract. de Sponſal. 2. parte c. 4. §. 1. n. 7. (*e*) Summa Roſella, & Summa Silveſtrin. ubi ſuprà.

he

he will Marry her, or give her 100 *l.* (*f*); and if he give her the Mony, he is delivered from Marriage (*g*); but if he refuſe, or delay to give her the Mony, he is bound to Marry her (*h*).

(*f*) Silveſtr. Prier. verb. matrimonium el. 3. q. 7. in fin. Clavaſ. verb matrimonium, 3. n. 8. Baptiſta verb. matrimonium. el. 5 verſic. *quid ſi dicat, ſi permiſeris, &c.*

44. What ſhall we ſay to this Condition, [*Si te Virginem invenero, Si in primo Coitu mihi placueris*; *If I ſhall find thee a Virgin, If thou ſhalt pleaſe me when I firſt deal with thee?*]

45. Some hold that this is an unhoneſt Condition, and therefore rejected (*i*), and conſequently that the Contract is pure and ſimple, Whether ſhe be a Maid, or not a Maid; or whether ſhe pleaſe or diſpleaſe at the Trial (*k*). Others hold, That albeit the Act be unhoneſt, yet is the Condition not unhoneſt, and therefore not rejected, but ſuſpendeth the Contract until the Act be compleated, whereby it may appear whether ſhe be a Maid or no (*l*); and then if it appear that ſhe be a Maid the Contract is good, but if ſhe appear to be no Maid, the Contract is void (*m*); elſe ſhe being privy to her own Fault, ſhould reap a benefit by her own Deceit (*n*); wherefore going about to deceive another, ſhe remaineth without remedy, if ſhe be deceived herſelf (*o*). And they ſay further, That in caſe ſhe be not a Maid, and the truth cannot appear, the Man is not tied in Conſcience to retain her for his Wife (*p*): Nevertheleſs, as well for the defect of proof, as for the ſcandal which otherwiſe would enſue, the Law will charge him to entertain

(*g*) *Nam Regula eſt, quod in alternativis, debitoris eſt electio.* L. plerunque. ff. de Jur. Dot. L. quid autem. § ſi maritus. ff. de donat. vir. & ux. L. eum qui certarum. § ultim. de verb. ob. ff. quam tamen regulam multifariam limitat Ripa. in c. inter cæteras. de Reſcr. extra.

(*h*) Arg. L. mancipiorum. ff. de opt. leg. Franc. Ripa. in c. inter cæteras. de Reſcr. extra. n. 72.

(*i*) Innoc. in c. de illis, de cond. appoſ. extra. poſt gloſſ. ibidem. (*k*) Hoſtienſ. in Rub. de condit. appoſ. extra. §. quæ conditio. verb. quid ſi contraho; de quo Melchior Kling. Tract. de cauſ. matrimonii. fol. 75. in princ. & Weſſenb. in Tit. de ritu nupt. ff. n. 8. verb. *Quid ſi quod ipſi Theologi, &c.* Summa Roſella. verb. matrimonium. el. 5. verſ. *quid ſi dicat accipiam, &c.* (*l*) Henr. Boic. in c. ſi Conditiones. de condic. appoſ. extra. verſus fin. (*m*) Henr. Boic. ubi ſupra. & Melchior Kling. Tract. de cauſ. matrimonal. fol. 75. (*n*) *Sed ex dolo nemo debet reportare commodum, nec dolus dolo ſo prodeſt* L. verum §. hoc quoque ff. pro Socio. Bald. in L. ſi infantem. C. de legatis. (*o*) *Dolo Dolus compenſatur* L. denum in fin. ff. de contrahend' Emp. *ſed viro decepto ſubvenitur, qui forte voluit vitare bigamiam, inquiunt* Henr. Boic. & Melchior Kling. ubi ſupra. (*p*) Henr. Boic. in c. ſi Conditiones. de cond. appoſ. extra. Kling. Tract. de cauſ. matrimonial. fol. 75.

tertain her as his Wife (*q*). A third ſort (whoſe Judgment is commonly received) do put a difference in the Underſtanding of theſe words, [*If I ſhall find thee a Virgin, &c.* (*r*)] for ſhe may be found a Virgin by honeſt means, that is to ſay, by the view and inſpection of her Body by honeſt Matrons. The words therefore being taken in this Senſe, that is to ſay, [*If I ſhall find thee a Virgin by the view of honeſt and skilful Matrons*] the Condition is honeſt, ſuſpending the Contract until the event of the Condition (*s*); and then, if being thus viewed, ſhe be found a Virgin, the Condition is purified, and the Contract made pure and ſimple (*t*); or if by the ſame means ſhe be found no Virgin, then is the Contract daſht, and of no force, unleſs before the view he himſelf do *know* her (*x*): But when theſe words [*If I ſhall find thee a Virgin,*] are not referred to the Trial by Matrons, but by Carnal Copulation, then is the Condition rejected as diſhoneſt, and the Contract pure and ſimple, whether ſhe be a Maid or no Maid (*y*): With greater reaſon then is this Condition rejected, [*Si mihi in primo Coitu placueris*] albeit he were deceived of his expectation; And though ſhe peradventure carried a deceitful meaning in ſo promiſing, yet without peradventure he did carry a ſinful mind in exacting the performance of ſuch an unhoneſt Condition (*z*).

(*q*) Boic. & Kling. ubi ſupra.

(*r*) Cardinal. & Præpoſ. in c. per tuas de condic. appoſ. extra. Summa Angel. verb. matrimonium. Impediment. 3. n. 7.

(*s*) Cardinal. & Præpoſ. in d. c. per tuas.

(*t*) Cardinal. & Præpoſ. ubi ſupra. Clavaſ. in Summa Angelicâ qui dicit quod hanc opinionem DD. communiter ſequuntur.

(*u*) ibidem.

(*x*) Boer. conſil. 40. n. 129.

(*y*) gloſs. in d. c. per tuas. & ibi Cardinal. & Præpoſ. Covar. Tract. de Sponſ. ſecunda parte, c. 3. §. 2. n. 12.

(*z*) Inno. in c. de illis de condic. appoſ. extra.

Vide Weſſenb. in Tit. de ritu nup. ff.

X SECT.

SECT. XIII.

Of contracting Spousals either betwixt Parties present or absent.

1. THirdly, Spousals be contracted either betwixt them that be present, or betwixt them that be absent (*a*). Present (I mean) when the one Party is within the compass of the others Sense, especially of hearing, &c. (*b*). Absent when the one doth not hear nor apprehend the other with any Sense (*c*). When they which be present Contract Spousals or Matrimony together, it is a question whether it be necessary to the Validity of the Contract, that both the Parties do at *one time* express their mutual Consents, and uttering the words of the Contract immediately one after another; or whether it be sufficient that the one Party do signifie his or her Consent at one time, and the other Party at another time (*d*).

(*n*) Melchior. Kling. Tract. de caus. matrimonial. fol. 2. c. ultim. de procur. in Sext. Covar. Tract. de Sponf. secunda parte, c. 4. n. 7. Anto. Gubert. Tract. de Sponsal. fol. 24. n. 18. Summa Silvestrin. verb. Sponsalia. q. 2. in fin. lib. 2. consil. matrimonial. consil. ibidem 13. n. 2. cum seq. & consil. 17. n. 3.

(*b*) Gloss. & Cardinal. in Clem. c. dudum de Sepul. §. statuimus. verb. præsentari. (*c*) L. absentem. & ibi gloss. & DD. de Verb. Sign. ff. (*d*) de hac q. omnes fere DD. in c. dilectus. & in c. pen. de Sponf. extra. & Covar. Tract. de Sponsal. secunda parte. c. 4. in princ. n. 6. & 7.

2. In which Question some pull this way (*e*), and others draw that way (*f*); but they may be reconciled by this

(*e*) *Et quidem non esse necessarium, utrinsque consensum eodem tempore exprimi tenent* Hostiens. Jo. And. Præpos. *quorum opinio ut est communior.* Teste Covar. ubi supra. ita & æquior, Teste Panor. in d. c. cum dilectus. licet ipse refragetur. (*f*) *At simul consentiend', & incontinenti respondend',* docent Specul. in Tit. de Sponsal. per l. continuas. & l. 1. in princ. ff. de verb. ob. Panor. in d. c. dilectus. in fin. Antonius consil. 64. *& hanc opinionem in jur' tutiorem & veriorem affirmat* Panor. loco prælleg.

this diſtinction; for either doth that Party, whoſe Conſent was firſt uttered, perſevere and continue in the ſame mind and purpoſe, without change or alteration, until the other Party do promiſe and expreſs the like Conſent; and then is the Contract good notwithſtanding the long diſtance of time coming betwixt the expreſſing of their ſeveral Conſents (*g*); or elſe doth not that Party, which firſt ſpoke the words of the Contract, perſevere and continue ſtill in the ſame mind, until the other Party likewiſe yield expreſs Conſent, but doth repent in the mean time, and then is not the Contract of any force at all (*h*): For howſoever it be not neceſſary, that the Parties contracting Spouſals or Matrimony, ſhould ſpeak both at once, or ſignifie their mutual Conſents immediately one after another (*i*); yet is it more than neceſſary that both their Conſents *concur* together at one and the ſame inſtant (*k*), which thing alſo the propriety of the word *Conſent* doth import; for [*Conſenſus*] is as much as [*ſimul Senſus* (*l*),] an agreeing together at one time, without which Conſent or mutual Agreement at one and the ſame Inſtant, certainly neither Matrimony nor Spouſals can conſiſt (*m*).

(*g*) Henr. Boic. in c. cum dilectus. de Sponſal. extra. Zaſ. conſ. 4. n. 8. in fin. vol. 2. Anto. Quetta. Cujus conſil. extant in lib. 2. conſil. matrimonial. conſil. ibidem 13. n. 16. verſic. & quidem per diſtinctionem, &c. Cardinal. in c. pen. de Sponſ. q. 1. Pariſ. conſil. 55. n. 16. Prier. verb. matrimonium. el. 2. q. 6.

(*h*) Anto. Quetta. d. conſil. 13. n. 7. Henr. Boic. ubi ſupra. Præpoſ. in c. ſi inter. de Sponſal. extra. notab. 3. Pariſ. conſil. 55. n. 16. Zaſ. d. conſ. 4. vol. 2. n. 8. in fin. Alciat. in L. 1. §. qui præſens. ff. de verb. oblig n. 12. Summa. Silveſtr. verb. matrimonium. §. 2. q. 6. (*i*) Covar. Tract. de Sponſal. ſecunda parte c. 4. n. 5. in fin. Ferret conſ. 246. n. 6. (*k*) c. ſi inter. de Sponſal. extra. ibi mutuo. & Præpoſ. in eod c. notab. 3. facit gloſſ. in L. conſenſu. ff. de action. & oblig. Molin. in l. 1. §. 1. de verb. obl. ff. n. 13 cum ſeq. Accedit c. quia propter. & c. cum poſt. de elect. extra. lib. 2. conſ. Matrimonial. conſil. ibidem 13. n. 7. Boic. in d. c. cum dilectus. (*l*) Dominicus. de S. Gem. in c. ſi oblato. de litis conteſt. in Sext. Spiegel. lexic. verb. conſentire. (*m*) c. Tuæ, & c. ſi inter de Sponſ. extra. L. nuptias ff. de Reg. Jur. de conſil. 13. n. 7.

3. But now having crept out of one Queſtion, we ſlip into another no leſs doubtful, nor no leſs needful to be known than the former; for what if it do not appear by any outward Act, whether the Party,

whose Consent was first expressed, do persevere in the same mind or not, whether shall this Party be presumed still to continue thus aminded, until the other Party likewise signifie his or her mind, yea or no (*n*)? Here again is hard holding and drawing amongst the Doctors (*o*); for some tell us that he is presumed (*p*) to persevere in the same mind still, when the contrary doth not appear; others teach the contrary (*q*).

(*n*) de hac q.ª Zasius. consil. 4. & 5. vol. 2.

(*o*) DD. in L. 1. §. qui præsens. ff. de verb. oblig.

(*p*) Dominic. in c. 2. de Lit. cont. in Sext.

Ferretus consil. 246. n. 6. Zasius consil. 5. vol. 2. n. 7. vers. *Sed nunc habes, &c.* Menoch. de præsump. lib. 6. concl. 37. lib. 2. consil. matr. consil. ibidem 13. n. 7. in fin. (*q*) Præpos. in c. si inter. de Sponsal. extra. notab. 1. Anto. Gubert. cujus Consilium extat in lib. 1. consil. matrimonial. consil. ibidem 83. n. 16. lib. 2. cons. matr. consil. ibidem 7. n. 14. Zas. consil. 4. vol. 2. n. 8.

4. The Reasons of the Affirmative are chiefly these, *Mutatio non præsumitur* (*r*), *inconstantia reprobatur* (*s*), Change or Alteration is not presumed, Inconstancy is reproved; which Rule is beautified with many Cases and Examples (*t*), which because they be not so pertinent to our purpose, I omit. Again, thus speaketh the Text; *Si præsens interrogavit, & antequam responderetur discessit, & reverso responsum est, obligat* (*u*); If one present do interrogate and depart before answer, and returning, being answered, it bindeth.

(*r*) L. eum qui ff. de probat. c. majores. de Baptist. extra.

(*s*) Menoch. de præsump. lib. 6. præsump. 37.

(*t*) Menoch. ubi supra. Mascard. de probat. concl. 1082. & concl. 14, 15.

(*u*) L. 1. §. qui præsens. ff. de verb. oblig.

5. The Reasons of the Negative are these: To persevere is to do (*x*); now this is a common Rule, *Facta non præsumuntur nisi probentur* (*y*), Facts are not presumed unless they be proved, and therefore to persevere is not presumed, when it is not proved. Again, there is a Text which saith thus, *Si post interrogationem aliud agere cæperit, nihil proderit quamvis eâdem die spospondisset* (*z*),

(*x*) L. quicquid iracundiæ calore. ff. de Reg. Jur. L. diffamari §. si igitur C. de Ingen. manumiss. L. divortium. ff. de divor. & repud.

(*y*) L. in libello. §. facta. ff. de captiv. & posthum. c. Cum Johannes. §. verum. de fide Instrum. extra. Mascard. de probat. conclus. 732.

(*z*) L. continuus. de verb. oblig. ff.

If

If any after he be interrogated begin to do any other thing, it ſhall not profit, though he promiſe the ſame day; So we ſee here in this queſtion, here is Opinion againſt Opinion, Reaſon againſt Reaſon, and Text againſt Text.

6. But howſoever Men be contrary in Opinions, neither is reaſon nor Law contrary to it ſelf (*a*); Thus therefore is the Contradiction reconciled, The diſtance of time betwixt the promiſe of the one Party, and of the other is to be regarded, namely whether it be long or ſhort (*b*); if long, then is not the Party, which firſt promiſed preſumed to perſevere in the ſame mind until the other Party likewiſe promiſe (*c*); And therefore (for example) if this day the Man do promiſe unto the Woman, that [*he will*, or *that he doth take her to his Wife*]; and ſhe make the like promiſe to him the next day, this Contract is not good (*d*), nor is the Man preſumed to perſevere ſo long in the ſame promiſe (*e*); For it is agreed upon, and concluded generally amongſt all the Writers almoſt, of Fame and Eſtimation, That the ſpace of one day is a long time in this matter of Contracts, wherein mutual Conſent is requiſite (*f*); much leſs then if the Woman promiſe this day, and the Man next day, is ſhe preſumed to perſevere ſo long, the fragility and mutability of the fæminine Sex conſidered (*g*); In this Caſe therefore that Rule, *Mutatio non præſumitur* hath no place, neither that Text, *Si præſens interrogavit*, &c.

(*a*) L. cum quidam. §. ſuum & ibi Bart. de acquir. hæred. ff.

(*b*) Zaſius. conſil. 5. vol. 2. n. 13. *quod quidem conſilium fuit* Ant. Quettæ. ut patet. lib. 2. conſil. Matrimonium. conſil. ibidem 13. Idem Zaſ. conſil. 4. vol. 2. *at iſtud conſilium eſt Pariſij, id quod ex illius ſubſcriptione clarum eſt.* n. 34. *& invenitur apud eund.* Pariſ. lib. 4. conſil. 55.

(*c*) Zaſ. conſil. 5. vol. 2. n. 13. lib. 2. conſil. Matr. conſ. ibidem 13. n. 13. Covar. Tract. de Sponſal. 2. parte. c. 4. in princ. n. 7. DD. in L. 1. §. 1. ff. de verb. oblig. (*d*) Zaſ. de conſil. 5. n. 14, & 15. lib. 2. conſ. matr. conſil. ibidem 13. n. 14, 15. Covar. ubi ſupra. Pariſ. conſil. 55. vol. 4. n. 14. in fin. Jaſ. in l. ait prætor §. Si neque ff. n. 3. & 10. & communiter DD. in l. 1 §. 1. ff. de verb. ob. (*e*) Zaſ Jaſ. Pariſ. & Covar. ubi ſupra. Molin. in d. §. qui præſens n. 4. Alciat. ibidem n. 12. & ita exaudiendi ſunt Præpoſ. in c. pen. de Sponſ. extra. *& alij tenentes, non præſumi perſeverantiam con.* Dominic. in c. 2. *de litis conteſt. in* Sext. 6. *& alios contrarium ſtatuentes.* (*f*) Bar. in l. 1. §. 1. ff. de verb. ob. ff. n. 1. quem ibi ſequuntur communiter DD. nempe Imol. & Jaſ. n. 9. & Ripa. n. 15. qui monet nè diſcedamus ab. op. communi. Zaſ. d. conſ. 5. n. 14. (*g*) Menoch. de præſump. lib. 6. Præſ. 37. n. 42. dec. conſil. 163. n. 26. c. forus. de verb. ſig. extra.

Where

Where it is ſaid, if one preſent do interrogate and depart before anſwer; and returning, anſwer be made, this is a good Contract; for it followeth in the very next Sentence, *Intervallum enim medij temporis modicum non vitiat obligationem* (*h*), The diſtance of the mean time being ſmall, doth not deſtroy the bond. So that it is evident, that that Text doth not ſpeak in our caſe, where the diſtance is great.

7. Nevertheleſs this Concluſion, that by long diſtance of time the Continuance of this mutual Conſent is interrupted, and ſo the Contract void (*i*), is not free from all Exceptions (*k*): Firſt therefore, if the Parties continue ſtill preſent without departure from the place; and without dealing in any other Act, contrary or impertinent to the matter in hand, the long diſtance alone doth not interrupt, or hinder the validity of the Contract (*l*): As for the purpoſe, the Man deliberately pronounceth the words of the Contract before the Woman, and asketh her, whether ſhe be content to make the like promiſe to him. She anſwereth, I will firſt confer with my Friends, or with my Counſel; which Conference perhaps continueth a whole day, or ſomewhat more, the Man ſtill attending her anſwer (*m*); And in the end without any new interrogation, ſhe pronounceth the like words to him as he did to her, This I hold for a good Contract (*n*).

(*h*) L. 1. §. qui præſens. in fin. ff. de verb. ob.

(*i*) *quam concluſionem, viz. longum intervallum ſolum ſine alio actu contrario vel extraneo contractum vitiare communi* DD. *calculo con.* Gloſſ. & Paul. de caſtro, receptam oſtendunt Jaſ. in d. §. 1. n. 8. Alciat. ibidem n. 21. Ripa n. 7. quibus accedit Covar. Tract. de Sponſal. n. 7.

(*k*) Vide Ripam in l. 1. §. 1. ff. de verb. ob. n. 11. *ubi tradita eſt regula tribus limitationibus illuſtrata.*

(*l*) Paul. de Caſtro. in d. §. qui præſens. verſ. Recoillige, &c. Ripa ibidem. n. 12. ubi hanc limitationem variis confirmat medijs. Alciat. quoque eodem §. n. 24. qui tum in fine labitur. (*m*) *Secus enim eſſet, ſi diſcederet & ex intervallo rediret, quia palam eſt, actus contumacionem per diſceſſum (niſi ſtatim revertatur) interrumpi.* d. §. qui præſens. (*n*) Ripa in d. §. qui præſens. n. 12. poſt. Caſtrenſem ibidem. Adde Molin. eod. loco. d. 9. *quorum opinio eo facilius procedit in Contractu Matrimonali; quo hic alijs Stipulationibus eſt favorabilior* Zaſ. in L. Si Stipuler. §. fin. n. 7. *& hoc Caſu procedit opinio* Archid. *quem ſequitur Dominic. in c. ſi oblato* de lit. conteſt. in Sext. Ferretus conſ. 446. n. 6.

8. Se-

8. Secondly, if a certain time be appointed wherein to deliberate, as if the Man do promiſe this day, and the Woman obtaineth reſpite for her anſwer, until the next day; whereupon the Man departeth, and returneth at the time appointed; if then the Woman make the like promiſe to the Man, not diſſenting then, nor having erſt repented of his former promiſe; I ſuppoſe the Contract to be of like effect, as if there had not been either, diſtance of time, or departure from the place (*o*).

(*o*) Alciat. in L. 1. §. qui præſſ. de verb. ob. n. 24. & Ripâ ibidem n. 11. Imol. in L. Si Stipuler. §. fin. de verb. oblig. Alex. conſil. 107. vol. 1. idem affirmant Jaſ. in l. Si ſtipuler. §. Si in locando. ff. de verb. oblig. & Molin. in d. §. qui præſens. n. 17. ſi viz. & quatenus conſtet de perſeverantiâ alterius. vide Addic. purpurat. ad Jaſ. in d. § qui præſens.

9. Thirdly, If the Party, who firſt promiſed, do at the promiſe of the other Party, following a long time after, accept the ſame, and conſent thereunto; then is the Contract good, by reaſon of this new Conſent concurring with the late anſwer (*p*).

(*p*) L. ſi Stipuler. §. Si in locando. ff. de verb. oblig. & ibi Imol. & DD. Molin. in d. §. qui præſens. ff. de verb. oblig. n. 17.

10. If the time betwixt the promiſe of the one Party and of the other, be not *long*, that is to ſay, not above a day (*q*) (I mean a natural, not Artificial day) (*r*), then is that Party who firſt made promiſe, preſumed to continue his Conſent, until the other Party have made the like promiſe (*s*); and ſo the Contract is of like force, as if they had promiſed both at once (*t*).

(*q*) Bar. & poſt eum DD. in l. 1. §. 1. de Verb. oblig. (*r*) Zaſ. conſil. 5. vol. 2. n. 15. quod conſil. extat. lib. 2. conſil. Matr. conſil. ibidem. 13. n. 15. *naturalis dies ex antiquorum Summâ, id tempus dicitur, quod à luce eſt ad tenebras, non ſpacium 24. horarum, quamvis* Accurſ. Paul. de caſtr. Rom. & Jaſ. *diem hunc qui 24. horarum ſpacio conficitur, Matrimonialem appellant, ſed errantèr, ſi credimus* Alciat. in l. 2. de verb. Sig. Tiraquel. de Retract. Lignagier. §. 1. gloſſ. 11. n. 3, 4, 5. Spiegel. Lexic. verb. dies. Rebuff. in d. L. 2. & aliis. *Ego verò* Molinæum *ſequutus, nec octodecim quidem horarum ſpacio contractum vitiari, ſi tamen conſtat partes in eodem actu gerendo, perſeveraſſe.* Vide Molin. in L. 1. §. qui præſens ff. de Verb. oblig. n. 9. (*s*) Zaſ. ubi ſupra. Covar. Tract. de Sponſal. 2. parte. c. 4. n. 7. Alciat. in l. 1. 5. qui præſens ff. de verb. oblig. n. 12. (*t*) Ibidem.

As

11. As for the Argument, That facts are not preſumed (*u*), but to perſevere is a fact (*x*); therefore not preſumed, it may eaſily be retorted; for if facts be not preſumed, then mutation being a fact is not preſumed (*y*); And certainly much more properly is mutation a fact than perſeverance, for perſeverance is but the continuation of a former Act (*z*); Whereas mutation or change, is a new contrary Act (*a*), and therefore not ſo eaſily preſumed; and as for the Text, *Si poſt interrogationem, &c.* (*b*) which ſaith, That if after interrogation, the Party begun to do another Act, it profiteth not, though he anſwer the ſame day; This Text doth not only not hinder, but further this preſumption of perſeverance; for in that it is ſaid, if the Party begun to do another thing, it profiteth not, if he anſwer the ſame day, *&c.* we may thereby gather (by an Argument *à contrario ſenſu*) that if the Party do not begin another Act, then it profiteth if he anſwer the ſame day (*c*); But doth every mean Act between the former, and the ſecond promiſe interrupt the continuance of the Parties Conſent, and ſo make void the Contract? The regular Concluſion is, that it doth (*d*), but alloweth theſe Limitations.

(*u*) L. in libello. §. facto ff. de captiv. & poſtlim. c. cum Johannes. §. verum. de fide inſtr. extra.

(*x*) L. divortium non eſt de divor. & repud. L. quicquid de Reg. Jur. ff. cum ſimilibus.

(*y*) Maſcard. de probac. concluſ. 1082. *Ubi tradit regulam non paucis auctionibus roboratam, quòd mutationem præſumitur.*

(*z*) Bald. in L. quicunque C. de ſer. fug. n. 23. & in L. quidam col. 9. C. de jure delib.

(*a*) L. certi. §. fin. L. ſingularia ff. ſi cer. pet.

(*b*) L. continuus. ff. de verb. ob. ff. in princ.

(*c*) Vide DD. in d. L. continuus. & in L. 1. §. qui præſens. ff. de verb. oblig.

(*d*) Hanc regulam conſtituit Franc. Ripa. in d. §. qui præſens. per. d. L. continuus.

12. Firſt, when the Act is naturally neceſſary (*e*); and therefore to make Water, or to exonerate the Body, or to Dine or Sup, doth not interrupt the continuance of Conſent (*f*), eſpecially in ſo favourable a Caſe as Matrimony (*g*).

(*e*) L. cum antiquitùs C. de teſtam. Bar. & alii in L. 1. §. 1. ff. de verb. oblig.

(*f*) Ripa. in d. §. qui præſens. n. 18. Molin. n. 19. Alciat. n. 9. *qui omnes indiſtinctè ſic docent, quamvis non deſunt, qui quoad Prandium vel Cœnam differentiam faciunt inter ſanum & ægrotum, quam diſtinctionem refellit.* Ripa. *loco præall.*

(*g*) Zaſ. in l. Si Stipuler §. ultim. n. 7. de verb. oblig. ff.

13. Se-

13. Secondly, when the Act is acceſſory or adhærent to the principal matter, as to call for Witneſſes, or to confer with their friends, therein it worketh no interruption (*h*).

14. Thirdly, when the Act conſiſteth only in words, as to ſing a Song of *Robin Hood*, albeit it be neither neceſſary nor pertinent to the Cauſe, it maketh no breach or interruption (*i*).

15. Fourthly, when the Act is very ſhort and brief, it hath not to interrupt the Conſent; as to ſalute any Perſon, to read a Letter, to Seal a Proceſs, &c. (*k*).

16. Fifthly, when the Party promiſing departeth forth of the place; and returneth ſhortly again, here is no interruption, but that the like promiſe being made by the other party upon his return, it is as if there had been no departure (*l*): What if the Party, having firſt promiſed Matrimony, depart forth of the place, and whiles he is going forth, the other Party maketh the like Promiſe? For Example; The Man ſaith to the Woman, [*Here I take thee to my Wife,*] and then departeth from the place; and as he is going, the Woman ſaith to him, [*And here I take thee to my Husband,*] Whether is this a good and ſure Contract, yea or no?

17. In reſpect of divers Circumſtances the Anſwer may be divers: If the Man did not hear the Woman, the Contract is of no more force, than if the Woman had not ſpoken at all (*m*): If the Man did hear the Woman, it is material, whether he departed ſuddenly without expectation of her Anſwer, or not? If ſo, it is holden that the Contract is not good, and that this ſudden departure, is an Argument that it repented him of his former Promiſe (*n*), unleſs having heard her voice,

(*h*) Jaſ. in d. §. qui præſens. in fin. Ripa. n. 17. Molin. n. 9.

(*i*) Paul. de Caſtr. & Alex. in d. §. & ibi. Rip. n. 18. in fin.

(*k*) Molin. in d. §. n. 9. *& hoc quidem verum eſt in actu modico, non habente effectum Juris, alias ſecus, puta cum alio contrahere; advocatum per unam aut alteram horam agere,* Zaſ. & Ripa. ibidem.

(*l*) Text. in §. qui præſens. L. 1. de verb. ob. ff. *ibi ſi vero, &c. nec reputatur diſceſſus omnino extraneus actus, niſi interveniente longo intervallo (inquit* Caſtrenſ. ibidem.)

(*m*) Paul. de Caſtr. in L. 1. §. qui præſens. ff. de verb. oblig. & Prier. poſt eum. Jaſ. etiam in princ. Alciat. n. 1. Zaſ. n. 3.

(*n*) Franciſ. Ripa. in d. §. qui præſens. n. 6. in princ. Alciat. ibidem. n. 1. verſ. unde magis placet, &c.

he did stay to understand her Answer; for this his stay is an Argument that it did not repent him of his former Answer (*o*): If otherwise, that is to say, if the Man did not depart immediately after he had uttered the words of the Contract, but expected her Answer: This slow and unwilling departure, is an Argument rather of perseverance, than of Repentance; and therefore the Contract is rather to be adjudged for a good Contract in this Case (*p*).

(*o*) Ripa. d. n. 6. versic. *Ex quo infertur, &c.*

(*p*) Ripa. d. n. 6. *Si vero expectato responso, &c.*

18. Not only such Persons as be present, but those Persons also which are absent may contract Spousals or Matrimony together (*q*). So did *Isaac* and *Rebecca*, as it appears in the Sacred Scriptures (*r*). Betwixt them that be absent, Spousals or Matrimony may be contracted three manner of ways; that is to say, by *Mediation* of their Proctors (*s*), or of *Messengers* (*t*), or of *Letters* (*u*); provided nevertheless in every of those Cases, that the Parties have some notice or intelligence the one of the other, at least by *Fame* or *Report* (*x*); for unto those who be utterly *uknown* to us, we cannot yield our Consent (*y*), (without the which it is impossible to contract Matrimony or Spousals) no more than it is possible for us to love them, of whom we have never heard (*z*).

(*q*) L. sufficit & L. fin. de Sponsal. ff. c. ex parte tua. de conversc. coming. extra. c. ultim. de procur. in Sext. & ibi Dom. de S. Gem. & Phil. Franc. Covar. Tract. de Sponsal. secunda parte, c. 4. n. 8. Coraf. lib. 3. Miscell. c. 3. n. 2. lib. 2. consil. matr. consil. ibidem 13. n. 2. & consil. 17. n. 3.

(*r*) Genes. c. 24. Prier. verb. matr. §. 5. q. 9. gloss. in c. nec illud. 30. q. 5. (*s*) c. ultim. de procur. in Sext. & ibi DD. *quamvis hic procurator nuncius censeri debet potius, inquit* Covar. Tract. de Sponsal. secunda parte. c. 4. n. 8. in fin. Franc. in c. ultim. §. ult. de procur. in Sext. n. 7. in fin. (*t*) L. ultim. ff. de Sponsal. (*u*) ead. L. ultim. Summa Hostiens. Tit. de Sponsal. §. qualiter. (*x*) Gloss. in c. nec illud. 30. q. 5. Melchior Kling. Tract. de Sponsal. fol. 2. Dominic. in c. ultim. de procur. in Sext. n. 2. (*y*) d. gloss. & Dominic. ubi supra. (*z*) Phil. Franc. in c. ultim. de procur. in Sext. n. 4. & ibi Dominic. de S. Gem. §. 1. paulo ante finem. gloss. in c. 1. §. 29. q. 1.

19. When Spousals or Matrimony is to be contracted by a Proctor first of all, it is needful that the Proxy (or Letter of Attorney) be Special (*a*), that is to say, ex-

(*a*) Text. in d. c. ultim. *qui tum loquitur ubi matrimonium contrahitur, sed idem juris, vel in Sponsalibus esse, firmant* Dom. & Franc. in princ. d. c.

pressing

preſſing a certain Perſon, with whom Matrimony or Spouſals are to be contracted (*b*); As, [*I make ſuch a Man my Proctor, to contract Matrimony or Spouſals for me, or in my Name with* A. B. &c. (*c*)]. Nor is it ſufficient if the Proxy be thus, [*I make* A. B. *my Proctor to contract Matrimony for me with any Woman,*] for the Perſon muſt be expreſſed certainly, either in the Proxy, or at leaſt by ſome other means, &c. (*d*): Neither is it ſufficient though Special Clauſes be added, the Proxy being general; as, [*I make* A. B. *my Proctor or Attorney for all my Buſineſs and Affairs, judicial and extrajudicial, with power and authority to do for me all and ſingular whatſoever I my ſelf could do, if I were perſonally preſent,* &c. (*e*)] Neither yet is it ſufficient, though the Proxy were ſufficient, if it be revoked in the time of the Contract, albeit alſo the Party do afterwards ratifie and confirm the Contract (*f*); but this Concluſion is not to be eaten now, eſpecially of a weak Stomack; for as it is hard of digeſtion, ſo it is likely to breed ill Humours (I mean erroneous Opinions (*g*),) if the Stomack be not prepared, and the thing it ſelf ſeaſoned, and made apt to be digeſted: Anon therefore, when thy Stomack is a little ſtronger, and the matter riper, thou ſhalt feed on that which now thou haſt but only a taſt of (*h*).

(*b*) Jo. And. Dom. de S. Gem. & Phil. Franc. in d. c. ultim.

(*c*) gloſſ. in d. c. ultim.

(*d*) gloſſ. & DD. in d. c. ultim. Summa Angel. verb. matrimonium el. 1. n. 19.

(*e*) ead. gloſſ. *quam intelligo niſi aliquis fortaſſe Articulus, ſpeciale mandatum exigens ſit expreſſus, nam tunc mandatum cum hujuſmodi Clauſulâ extenditur ad alia exigentia ſpeciale mandatum, dum tamen ſint conſimilia, & non majora caſu expreſſo.* Dominici in c. qui ad agendum. de procur. in Sext. *Ad majora autem expreſſa non extenditur illa Clauſula, cujus tamen Concluſionis Limitationes aliquot videas apud* Felin. in c. Sedes de reſcrip. extra. verb. Clauſula. &c. n. 5.

(*f*) Molineus in No. intellect. L. ſufficit. de Sponſal. Idem Molin. in Themate conſil. Alex. 146. vol. 5.

(*g*) Vide Ancharan. in c. ratihabitione. de Reg. Jur. lib. 6. Anto. de Butr. conſil. 64. Alex. con. ſil. 146. vol. 5. Præpoſ. in c. 2. de coming. Servorum. extra. Felin. in c. ex parte Decani. de reſcrip. extra. Dom. de S. Gem. in c. ultim. de procur. in Sext. §. ſane. n. 4. cum addic. ibidem.

(*h*) Infra eod. §.

20. The Proxy being ſufficient, the next thing conſiderable herein is the *form* or *matter* of words to be con-

considered and observed by the Proctor in contracting Spousals or Matrimony, wherein some do hold that the Proctor ought not to frame the words in his own Name, or as Proctor (*i*), but in the name of the Party, like a *Messenger* (*k*); and if he do otherwise, that the Contract is void (*l*): And therefore if he say thus, [*I being such a mans Proctor, do here promise that I will marry thee*;] or thus, [*Here I take thee to Wife in the Name of such a man whose Proctor I am,*] this is a void Contract (*m*); whereas if he had said thus, [*I being such a mans Proctor, do promise that he will marry thee*;] or thus [*Such a man doth take thee to his Wife by me being his Proctor,*] this is a good Contract (*n*), she making the same Answer to him again, *viz.* [*I do promise thee in his Name, and him by thee, that I will marry him*;] or thus [*I do take him to my Husband by thee, being his Proctor*;] for in the one Case Spousals, and in the other Case Matrimony is contracted (*o*). The reason of the difference is this, because where a Proctor, as a Proctor, doth make a Contract with another Person, there by the Civil Law, he which did constitute the Proctor, hath not a direct or immediate Action against that third Person for the performance of the Contract (*p*): But otherwise it is when the Contract is made by a *Messenger*, who comes not in his own Name, but in his that sent him, being as it were the *voice* of the others mind, and the Picture of his Person (*q*). Now then, because in a Contract of Matrimony it is requisite, that the one Party should be bound immediately to the other, and that either of them should have direct Action against the other (*r*), it is behoveful (by this former Opinon) that

(*i*) Petr. Anchar. in c. ultim. de procur. in Sext. n. 2. & 3.

(*k*) Petr. Anchar. ubi supra.

(*l*) Anchar. in d. c. ultim. per l. multum. C. si quis alteri, vel sibi.

(*m*) Ibidem per d. L. multum.

(*n*) Summa Hostiens. in Rub. de Sponsal. §. qualiter. Prier. verb. matrim. §. 5. in fin.

(*o*) Hostiens. & Prier. ubi supra. Dom. de S. Gem. & Phil. Franc. in c. ultim. de procur. in Sext.

(*p*) L. per procur. ff. de procur. ubi DD. *communiter dicunt quod regulariter per procurationem actio non acquiritur Domino, sine cessione, secus per nuncium L. multum.* & ibi Bar. C. *Si quis alteri, vel sibi.*

(*q*) Phil. Franc. post Jo. And. in c. ultim. de procur. in Sext. n. 7. vide (præcor.) Bar. in L. qui autem constituere. ff. de const. pec. n. 3. per L. fin. ff. de Sponsal.

(*r*) Bar. in l. qui bona. §. si alieno. ff. de damno infect.

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the Proctor frame the words, not in his own Name, or as Proctor, but in his name who did conſtitute him, and as his Meſſenger (*s*).

(*s*) Anchar. in d. c. ultim n. 2. & 3. & ibi Franc. n. 7.

21. Others nevertheleſs (whom I rather follow) reject this former Diſtinction, as conſiſting rather upon a *Quiddity* than *Equity*, and ſtuffed with rigour inſtead of favour (*t*); Wherefore it is not material, whether the Contract be formed in theſe words, [*I do Contract Matrimony with thee in the Name of ſuch a Man, whoſe Proctor I am, &c.*] or in theſe words, [*Such a Man doth contract Matrimony with thee by me his Proctor;*] for as well by the former words, as by the later, Matrimony is contracted (*u*), although more properly by the later (*x*); for (if we will ſpeak properly) a Proctor thus appointed to contract Matrimony, is deemed a Meſſenger rathan a Proctor (*y*).

(*t*) Covar. Tract. de Sponſal. ſecunda parte. c. 4. n 8. Alex. conſ. 149. vol. 5. n. 13. Bar. in L. qui bona. §. alieno. ff de dam. infect. n. 3.

(*u*) Bar. Alex. & Covar. ubi ſupra.

(*x*) Covar. d.c. 4. ſecunda parte. n. 8. Bar. in L. qui bona. §. ſi alieno. ff. de dam. infecto.

(*y*) *Procurator quamvis faciat actum procuratoris nomine, tamen cenſetur gerere officium Nuncij, & perinde eſt, ac ſi Dominus ipſe diriſtè faceret, inquit* Alex. conſil. 149. vol. 5. n. 14.

22. Furthermore, It is not only neceſſary that the Proxy be ſufficient, and that the Contract be made in due form, as aforeſaid; but it is requiſite alſo that the Party which did conſtitute the Proctor, do perſevere and continue in the ſame mind and purpoſe, until the Contract be finiſhed (*z*); for if he repent in the mean time, or revoke his Proctor (which thing is lawful for him to do (*a*) though he had covenanted (*b*), yea and ſworn (*c*) not to revoke him) the Contract is utterly void (*d*), which Concluſion hath place, albeit the Proctor were *ignorant* of the Parties repentance or revocati-

(*z*) Zaſc conſil. 5. vol. 2. n. 7. per c. ſi inter. de Sponſal. & per c. 1. & c. duas. de Sponſa duorum. extra. Summa Roſell. verb. matrimonium. el. 2. verſic. quid ſi aliquis.

(*a*) Inſtit. Tit. de mandato. §. reſte L. ſi vero non. §. ſi mandavero. ff. mandat. c. quamvis. de procur. in Sext.

(*b*) Cyn. in L. 2. C. de Jure Emphyt. Jo. And. in c. 2. de procur. in Sext. Addic. ad Felin. in c. ex parte Decani, n. 12.

(*c*) Gloſſ. in c. ultim. de procur. in Sext. verb. revocatus Felin. in c. ex parte Decani. de reſcript. extra. Bar. in L. cum præcatio. ff. de præca. Phil. Franc. in d. c. ultim. n. 5. & ibi Dom. §. ſane. n. 4.

(*d*) c. ultim. de procur. in Sext. §. ſane.

on.

on of the Proxy (e), seeing the perseverance and continuance of the Parties Consent, which did constitute, is so necessary, as without the which the Contract is not of any force.

(e) d. f. sane, *licet enim regulariter et revocatio sortiatur effectum ad procuratoris noticiam pervenire debet, fallit tamen in hâc contrahendi specie, quia ubi verus Domini consensus est adhibendus in actu gerendo (ut hic) nec sufficiat fictus, ut passim alibi, maximè in Judiciis; Ideoque opus non est ut hujusmodi revocatio sit Procuratori intimata*, Dom. de S. Gem. & Phil. Franc. in d. c. ultim. de procur. in Sext.

23. A third thing worthy the Consideration and Understanding in this Case, is this, namely, Whether the Party be presumed to persevere and continue in his former purpose, when it doth not otherwise appear by any external Act?

24. Which Question, albeit it may seem to be decided by the distinction of the great or small distance of time betwixt the constituting the Proctor and the making the Contract; that is to say, if the distance be small, then perseverance is presumed, otherwise not (f), accordingly as hath been heretofore disputed and discussed; yet that distinction is available, and to be regarded only where the Parties be present, and may answer each other within the circuit of one day (g), (as is there shown) not where they be absent, and cannot within so short compass of time (by reason of the long distance of place betwixt the one Party and the other) express their mutual Consent (h); otherwise if neither the Man should be presumed to continue, till the Woman had notice of his Consent, neither yet the Woman until the Man was

(f) Zas. conf. 5. vol. 2. n. 11, 12, 13. Covar. Tract. de Sponsal. secunda parte, c. 4. in princ. n. 7.

(g) Covar. ubi supra, *sic ibi loquutus, et hæc quidem (inquit) locum habent, ubi præsentes contrahere volunt matrimonium; at* Zasius (*fatetur*) *loquitur etiam, ibi absentes contrahere volunt, qui tamen non aliter audiendus est, quàm quando mulier ad quam mittitur procurator non statim, sed ex intervallo non modico, responsum dedit, vide eundem* Zas. d. conf. 5. n. 11. & n. 16. in fin. & 17. in princ. quod quidem Cons. extat etiam in L. 2. consil. matrimonial. & est consil. ibi. 13.

(h) Zas. d. consil. 5. n. 6. Bal. in L. 1. ff. mand. lib. 2. consil. matr. consil. ibidem 17. n. 5. *Id quod ante illos innuit* Host. in Tit. de Sponsal. §. qualiter, *Dum voluit tenere Sponsalia inter absentes contracta, Licet is qui procuratorem destinasset nullam inde cogitationem haberent, nempe propter juris potestatem quâ absentes contrahere valeant.*

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certified of her acceptance of his offer, Impossible it were for such as were absent (above one days Journey) to contract Matrimony together, because they did never consent together (*i*); But it is certain that they which are absent and distant many days Journey asunder, may nevertheless contract lawful Matrimony together (*k*); and therefore it is absurd in this Case, not to presume Continuance of Consent, without the which the Contract were not lawful (*l*): Wherefore I do reverently imbrace the worthy Opinion of *Hostiensis*, absolving this Question in this manner, *Quid si nec consentit, nec dissentit, nec de hoc cogitat qui procuratorem misit, tempore quo puella dissentit? Dicas standum esse Sponsalibus, tum propter favorem Matrimonij, tum etiam propter Juris potestatem, secundùm quam etiam inter absentes Sponsalia contrahuntur* (*m*). What (saith *Hostiensis*) if he which sent, the Proctor, neither consent nor dissent, nor think of it, at such time as the young Woman yieldeth her Consent? say, we are to stand to the Spousals in regard of the favour of Matrimony; and also in respect of the power of the Law, whereby Spousals may be contracted betwixt the absent. Another Reason may be collected out of that Text, which saith, That if the Proctor be revoked, the Contract made afterwards is void (*n*), *Ergo*, if he be not revoked, the Contract is good (*o*); Which nevertheless could not be, presuming defect of Consent (*p*). Indeed this seemeth reasonable and agreeable to the truth, that if the Woman do not immediately or shortly after the Proctor have imparted to her the cause of his coming, and pronounced the words of Spousals or Matrimony, according to his Commission, express her mutual Consent thereunto, but a long time after; in this

(*i*) *Hoc ipsum Argumentum ab impossibili deductum sibi ipsi objicit* Zasi. d. consil. 5. n. 6. *cui quomodo satisfaciat ipse videto.*

(*k*) Covar. Tract. de Sponsal. secunda parte. c. 4. in princ. n. 8. *et omnes uno ore* DD. in c. ultim. de procur. in Sext. *Id quod firmatur etiam sacrarum Scripturarum testimonio. Exempla sunt nobis* Isaac *et* Rebecca, Gen. c. 24. gloss. in c. nec illud 30. q. 5.

(*l*) L. nuptias. ff. de Reg. Jur. c. sufficit 27. q. 2. c. 1. de Sponsal. extra. Summa Rosella. verb. matrimonium. el. 2. vers. quid si aliquis.

(*m*) Hostiens. in suâ Summâ Tit. de Sponsal. §. qualiter, col. 2. quem Sequitur Prier. verb. Matrimonium. §. 5. q. 10 Baptista in Summa quæ dicitur. Rosella. verb. Matrimonium. el. 2. & alij alibi contrarium tamen tenet Jacob. Henrick. lib. 2. consil. Matr. consil ibidem 16. n. 2. & 3.

(*n*) c. ultim. de procur. in Sext.

(*o*) Arg. a contrario Sensu.

(*p*) Zas. consil. 5. vol. 2. n. 17.

Case

Case the mans Consent is not presumed to endure so long, if he affirm the Contrary (*q*); and consequently the Contract void (*r*), unless both the Parties afterwards ratifie and confirm the same, for then it is made good by their new Consent (*s*).

(*q*) Zas. d. consil. 5. vol. 2. n. 11. & n. 16. in fin. & 17. in princ. Paris. consil. 55. vol. 4. n. 14. lib. 2. consil. matr. fol. 111. n. 2. & 3.
(*r*) Ibidem.
(*s*) Jacob. Henric. in quod. consil. extat. in lib. 2. consil. ibidem 16. n. 3.

25. These things being well considered, we may the better attain to the true Solution of this hard Question, (whereof I spake a little before) Whether the Party having first *Secretly revoked* his Proctor at the time of the contract of Spousals or Matrimony, and yet nevertheless afterwards ratifying and confirming the same, the Contract be good, yea or no? Wherein that the truth may appear more evidently, instead of putting an imagined Case, I thought good to rehearse that famous and true History, which befell above 200 years past, betwixt the King of *Cyprus*, and a noble Lady of *Italy*, as followeth; About the time aforesaid, there was a noble Man of the most honourable and mighty House and Dukedom of *Millain*, who had two Daughters, the praise of whose excellent Beauties, and Superexcellent Vertues, Dame Fame (who never smothered her thoughts in Silence) had so mightily magnified in all the Countries thereabouts, that thereby the two noble Virgins were no less admired for their goodly and Godly ornaments of Body and Mind, than reverenced for their honourable Parentage; The name of the Elder Daughter was *Agnesia*, of the Younger *Catherina*, both of them of years marriageable, neither of them without Store of sundry Suitors; and those so highly renounced for dignity and desert, as happy was that Man, that could get but a sight of them; yet more happy they, when they could get a fair look of their Mistresses; but most happy and thrice blessed he, that could win his sweet Ladies favour, to become his Loyal Wife (such is the blessed and happy Estate of Virgins, in their prime and marriageable Years). Well Sir, the most excellent King of

of *Cyprus*, after that his Ears had been filled with the report of both theſe brave Ladies, and their rare vertues, eſpecially of the Younger, his heart was by and by inflamed with hot deſire to become an humble Suiter unto her for Marriage; for as he was then Wifeleſs, ſo was he meet to undergo the ſacred Match in each reſpect. Spurred on therefore on the one ſide, with a burning deſire to obtain his joyful wiſh; and the other ſide, with a freezing fear to be prevented of his wiſhed Joy, forthwith in all haſt he diſpatcheth an Ambaſſadour with a large Commiſſion, of many and great aſſured Offers; and with a ſpecial Mandate to contract for him, and in his Royal Name true, pure and lawful Matrimony with *Agneſia*, the Noble Daughter of the mighty Duke of *Millain*, Suppoſing her to be the younger Siſter, whom he meant to Marry. To Ship ſtraight goes the joyful Ambaſſador, and in very ſhort time attained *Italy* and *Millain*, leaving the Iſland to the King, and the King to his Muſes, who meditating ſtill on the matter, and conferring diligently with ſuch Perſons, by whom he might receive further intelligence herein; underſtood at laſt, that he had miſtaken her name, whom he meant to make his Wife; whereupon preſently he revoketh the Mandate, which he had made of contracting Matrimony with *Agneſia*: But the faithful Ambaſſador ignorant thereof, proceedeth effectually in his charge, and therein had ſo good Succeſs, as (to be ſhort) he contracteth Matrimony in the Kings Name, with the vertuous *Agneſia*; and ſhe thereupon carrieth her ſelf thence forwards in gravity as a Wife, (having received the nuptial Ring), and in Majeſty as a Queen, being eſteemed and honoured of others for no leſs: Which done, the Ambaſſador returneth triumphantly to *Cyprus*, and there maketh a juſt diſcourſe unto the King, how happily he had ſped; but the King was as ſaid to hear as the

other glad to report the ſucceſs: Nevertheleſs after many doubtful deliberations, conſidering it did not become the Conſtancy of a Man, not to perform his promiſe, much leſs the Majeſty of a Prince to reclaim his word of Honour, eſpecially in a matter of ſuch Moment, and with Perſons of ſo great Might, as one perſwaded by force of reaſon, more than provoked by the inſtinct of Love; and foreſeeing the dangers likely to enſue his refuſal, more than expecting the future Joys of his acceptance, was rather contented, than pleaſed with the Match; and ſo in the end ratified and confirmed the erroneous and diſcomfortable Contract: But when the aforenamed *Agneſia* heard tell, that it was not the Kings meaning to have married her at the firſt, nor yet liked the Match very well, when it was done; Lord! how ſhe took on without all meaſure; how ſuddainly were all the powers and qualities of her mind altered, and turned upſide down; her higheſt joys into deepeſt ſorrows, her faithful love into deadly hate, her ſhineing hope into darke deſpair, and her pleaſant Conceits into dreadful and tragical Reſolutions: And even as the angry Sea, when it is toſſed with the tempeſtuous blaſts of the mighty Winds, doth furiouſly rage, and terribly roar, diſdaining, (as it were) to be controuled by any other Creature, of whatſoever power or puiſſance; So Noble *Agneſia* deſpiteing that her Loyal Love ſhould be deſpiſed, her Princely Vertues contemned, or her Honourable Sex diſgraced by any Man, though he were an Emperor; fretteth, chafeth, and exceedingly grieveth at theſe, ſo bitter Storms, and violent blaſts of frowning Fortune, and in her raging mood, ſhe teareth the Wedding Garments from her Back, and plucketh the Nuptial Ring from her Finger, and violently throweth it into the Flaming Fire, ſwearing and proteſting with many Damnable Execrations, that ſhe will never acknowledge

knowledge the King of *Cyprus* for her Husband, but that ſhe will preſently marry another Man; Whereupon her Father and Friends ſeeing her reſolute mind, took Counſel of the moſt famous Lawyers, that were in thoſe-days (namely of *Antonius de Butrio* (*t*), and *Petrus de Anchorano* (*u*)), whether ſhe might ſo do or not; which Grave and Learned Men conſidering diligently of the Caſe, thought it needful to diſcuſs two other queſtions, ariſing out of the Fact, before they did decide the main queſtion propoſed. The one, Whether the Kings Error were in her *Perſon* whom he intended to Marry, or in her *Quality* (*x*), (as in her Age or Name); But of this queſtion more conveniently elſewhere (*y*). The other, Whether the Kings Ratification and Approbation aforeſaid, did fortifie and make good the former Contract; which Queſtion before it was concluded was ſeriouſly argued to and fro; and ſundry Reaſons alledged for the Confirmation, firſt of the affirmative, and then of the Negative part.

(*t*) Butr. conſil. 64. & inter. conſil. Ancho. ran. 129.

(*u*) Anch. conſil. 124. alias 128. ſic incipien. A. duas filias.

(*x*) *Verum non in qualitate ſed in Corpore Regem erraſſe conſultum fuit*, ut per Anto. de Butr. & Anchor. ubi ſupra. & per eundem Anchor. in c. Ratihabitionem de Reg. Jur. 3. in Sext.

(*y*) Infra.

26. The Reaſons of the affirmative, *viz.* That the Contract was made good, and whole and ſound by the ſubſequent Ratification, were theſe. Firſt, becauſe it is a Notorious Rule, both of the Civil and Canon Law, *Ratihabitio retrotrahitur & mandato comparatur* (*z*): Which Rule hath place even in thoſe Actions, which require a ſpecial Mandate or Proxy (*a*); Secondly, becauſe it is thus Written by divers Interpreters, *Generale Mandatum de Nuptijs contrahendis non ſufficit niſi Mandatis Ratihabitio ſubſequatur* (*b*): A general Mandate to contract Marriage is not ſufficient, unleſs his Ratification,

(*z*) L. ſemper qui non prohibet ff. de Reg. Jur. c. ratihabitionem de Reg. Jur. in Sext.

(*a*) Alex. conſil. 146. vol. 5 n. 3. Paul. de Caſtr. in L. mulrum. C. Si quis ſibi vel al. n. 2. Peckius in d. c. ratihabitionem n. 9. Dec. in d. l. ſemper. nu. 7. ibidem Cagnolus nu. 15. Alciatus in c. cum non ab homine de Judic. extra. n. 71. Felin. in c. Nonnulli. §. ſunt & alij. de reſcrip. extra. cum addic. ibidem in fin. Tiraquel. de Retract. §. 1. glo. 10. fol. 94. *& quidem magis communiter tenetur quam ratificatio, dum validat geſta per falſum procuratorem, etiamſi ſit major, & ſumma pro ſe lata & Caſus talis qui exigat Speciale Mandatum*, ut in Addic. ad Felin. ubi ſupra. (*b*) Bald. & alij in l. generale ff. de ritu nup.

which made the Mandate, do follow. Thirdly, for that we read this Concluſion, *Nullitas actûs, proveniens ex defectu Conſenſûs ſuperveniente Conſenſu purgatur, & actus confirmatur* (c): The nullity of an Act proceeding of the defect of Conſent, when the Conſent cometh, is purged, and the Act confirmed. Fourthly, whereas by the Civil and Canon Laws, the Contract of Matrimony is void, where the one Party doth erre in the *Servile* Condition of the other (*d*), (as if the Man ſuppoſe the Woman to be a Free-woman, which is found to be a Bond-woman); Yet nevertheleſs, if when the Error is detected, he do ratifie and confirm the Contract, then the ſame is of no leſs force than if he had not erred at all (*e*).

(c) Anchor. in c. ratihabitionem de Reg. Jur. in Sext. col. pen. per c. 1. de deſponſ. impub. lib. 6.

(d) L. cum Ancillis C. de inceſt. nup. c. 2. de conjug. ſervorum. extra.

(e) d. c. 2. §. mandamus de conjug. ſerv. extra.

27. The Reaſons which make for the Negative part are theſe. Firſt, becauſe the Acts of a revoked Proctor, or Mandatory cannot be ratified (*f*), for one thing cannot be reproved and approved (*g*). Secondly, becauſe the Acts done in the name of a falſe *Meſſenger*, cannot be ratified (*h*). Thirdly, becauſe it is not likely that the deceived Woman would have conſented or contracted Matrimony, if ſhe had known that the other Party had not likewiſe conſented, or that the Proctor had been revoked at the time of the Contract (*i*); Which reaſons conſidered, it was concluded, that, foraſmuch as before the time of the Contract, the King had revoked his Proctor, or rather his *Meſſenger*, being then alſo a falſe Meſſenger, by reaſon of the ſaid Revocation; and ſhe likewiſe being then in an Error (than which no-

(f) Paul de Caſtr. in L. Si Tutor. in fin. C. in quib. cauſ. reſtitut. non eſt neceſſ. Jaſ. in L. licet C. de procur. n. 10. Limitat. tertia; *verum iſta Concluſio non procedit indiſtinctè*, dic. igitur ut per Bald. in L. falſus C. de fur. & ſervo corrup. n. 23. Cui convenit Bar. in L. Pomponius ff. de Reg. geſt. extra. n. 10. in fin. qui aliam aſſignat rationem.

(g) L. diſpenſatorem. ff. de Solu. Adde Præpoſ. in c. 2. de conjug. Ser. extra.

(h) Cyn. Bar. & alij in l. multum C. *Si quis alteri, vel ſibi.* Idem Bar. in l. qui autem. §. conſtituere. ff. de Conſtitut. pecu. Jaſ. in L. Licet. C. de procur. in fin. *Atque hæc ratio eſt omnium potentiſſima*, teſte Molin. in Themate conſil. Alex. 146. vel. 5.

(i) Præpoſ. in c. propoſuit. de conjug. ſer. extra col. penul. lib. 1. conſil. Matr. conſil. ibidem 64. n. 14. Reuſner. de Cauſ. Matrimonial. q. 7. n. 10. & n. 39.

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thing is more contrary to Conſent) it was concluded (I ſay) by the aforenamed *Anto. de Butrio*, and *Petrus de Anchorano*, that this Ratification, made by the King of *Cyprus*, was not of ſufficient force in Law to bind the ſaid *Agneſia* to be his Wife, and conſequently that ſhe might lawfully marry elſewhere (*k*). Howbeit, after the death of *Anto. de Butrio*, *Anchoranus* (the Queſtion being publickly diſputed in the Univerſity of *Bononia*) is thought to have altered his Opinion; and that the Ratification did ſufficiently confirm, and make good the Contract (*l*); which Opinion others alſo have followed in the like Caſe, eſpecially *Alexander* of *Imola* (*m*), to whom for his ſound Judgment in doubtful Queſtions of Law, this great Commendation is given, *Alexandro duce vinces* (*n*), as if he were as victorious in his Counſels, as was *Alexander* of *Macedonia* in his Conqueſts; but as great *Alexander*, for all his Puiſſance and Policy, was ſometime forc't to retire, ſo this *Alexander*, as in other Caſes ſometimes, even in this Caſe, (I trow) muſt be forc't to recant, notwithſtanding all his Learning and profound Judgment, not only by reaſon of the great multitude of mighty Adverſaries in this quarrel (*o*), amongſt whom one *Molinæus* challengeth the two Captains in this bold manner; *Sed ego dico quod malè ſcripſit* Anchoranus, *& pejùs* Alexander, *quamvis artificioſè & elaboratè* (*p*); But I ſay, (ſaith *Molinæus*) that *Anchoranus* wrote ill, and *Alexander* worſe, though skilfully and painfully, but alſo by reaſon of the weakneſs and feebleneſs of their own Weapons, that is, their Arguments and Authority (*q*).

(*k*) Anto. de Butr. conſil. 64. Anchor. conſil. 228. Quibus accedunt Felin. in c. ex parte Decani. de reſcrip. extra. n. 10. Præpoſ. in c. 2. de conjug. Serv. extra. col. penul. Dominic. in c. ultim. de procur. in Sext. §. ſanè n. 4. cum addic. ibidem. & Molin. in Themate conſilij Alex. 146. vol. 5.

(*l*) Anch. in c. Ratihabitionem de Reg. Jur. in Sext. ubi producit 5 *Argumenta ad partem affirmativam; ſed mihi videtur quod hæc ſua diſputatio non fuit completa, intercedente morte ſeu alio impedimento.*

(*m*) Conſil. 146. vol. 5. (*n*) de Laudibus Bart. Bald. Paul. Alex. & Jaſ. legito Alciat. lib. 2. pererg. 42. & Nevizan. Sil. nup. lib. 5. n. 27. (*o*) Butr. conſil. 64. Anth. ubi contrarius conſil. 228. Felin. in c. ex parte Decani de reſcrip. extra. n. 10. Præpoſ. in c. 2. de conjug. Ser. Dom. in c. ultim. de procur. in Sext. (*p*) Molin. in Themate. conſil. Alex. 146. vol. 5. (*q*) Molin. ubi ſupra. & in novis intellect. in l. ſufficit cum l. ſeq. ff. de Sponſal.

28. For

28. For first, this Rule *Ratihabitio retrotrahitur*, &c. although it hold even in those Cases where special Mandates are requisite (*r*), (notwithstanding divers do deny (*s*),) yet doth it fail when the Mandate is *revoked* (*t*), at least where the Mandatary is a *Messenger* rather than a *Proctor* (*u*), as in this Case where he is said to be the voice of his Master's mind; or rather not so much, but only an Organ Pipe (as it were) or hollow Instrument through which the Master himself doth speak (*x*); in which Case, if any pretend himself a Messenger when he is not, his Acts cannot be ratified to his Masters benefit (*y*).

(*r*) Dec. & Cagnol. in l. semper qui non prohibet. de Reg. Jur. ff Peckius in c. ratihabitione. de Reg. Jur. in Sext. Alciat in c. cum non ab homine. de judic. extra. Felin. in c. nonnulli. §. sunt & alij. de rescr. extra. Tiraquel. de retract. §. 1. gloss. 10. fol. 94. Paul. de Castr. in l. multum C. si quis sibi vel alteri. n. 2.

(*s*) Phil. Franc. in c. ratihabitione de Reg. Jur. in Sext. n. 5. verb. Sexto gloss. in c. nonnulli §. sunt & alij. de rescrip. extra. Accurs. in L. per procur. ff. de acquir. hæred. & in l. si maritus C. mandati. (*t*) Paul. de Castr. in L. si tutor. C. In quib. Caus. restit. non est necess. Jas. in L. licet C. de procur. *Sed ista conclusio non est perpetuò vera; Quare distingue, ut per* Bald. in L. falsus C. de fur. & Serv. corrup. n. 23. & per Bar. in l. Pomponius n. 24. de neg. gest. ff. Dyn. in c. ratihabitione. de Reg. Jur. in Sext. (*u*) Cyn. Bar. Angel. & alij DD. in l. multum. C. si quis alteri vel sibi Jas. in l. licet. C. de procur. Bald. in l. falsus. C. de fur. in 22. Roman. Singular. 697. cum addic. Gabr. Sarayna ibidem. Molin. in Themate. consil. Alex. 146. vol. 5. *ubi inquit matrimonium non potest esse in pendenti, quoad sui vinculum, nec potest contrahi per verum procuratorem, sed per verum Nuncium; per falsum autem Nuncium contractum ratificari non potest sed dixit per novum, verum, dispositivum Consensum.* (*x*) Bar. in l. Qui autem. §. constituere. n. 3. ff. de constitut. pecun. Gabr. Sarayna. in addic. ad Rom. Singul. 697. Bald. in L. multum C. si quis alteri vel sibi. (*y*) *Rationem assignat* Baldus in d. L. multum. *his verbis, Si Nuncio deficiat mandatum non reperitur ibi persona sive subjectum, Nuncius enim nihil in se concipit, sed ponat in ore suo verbum Domini; et si Dominus non mandavit, nihil est, nihil loquitur: Porrò quum per Nuncium contrahitur, ipsi principales originem contractui dant: Consensus autem debet esse inter eos qui dant originem contractui, Sed ubi non est mandatum, non est Consensus. Ergo nihil potest ratificari, scias etiam quod obligatio non potest esse sine radice, nec radix sine Consensu, nec Consensus sine Actu, unde cum tria habeant substantiare Contractum, scilicet persona, quantum ad habilitatem; voluntas, quantum ad Consensum; potestas, quantum ad Nuncium, hæc tria desunt in falso Nuncio, quia nec est persona, nec voluntas, nec potestas, concipit etiam verba, in persona quam non repræsentat, voluntatem ejus annunciat, quæ non est, denique in se nihil omnino, in alio directè non potest, quare resultat omnino impossibile, de jure verò impossibilium nullus est obligatio, Hæc ille.*

29. Secondly, where it is collected that the Contract of Matrimony made by a *general Mandate* may be ratified (*z*), this Conclusion is not so general in sense, as

(*z*) Bald. in l. generale ff. de ritu nup.

as in words; for the Caſe of that Law whence this Concluſion is drawn, is this: The Father doth conſtitute a Proctor to get a Husband for his Daughter (*a*); the Queſtion is, Whether this Mandate be ſufficient? It is anſwered Negatively, (that is to ſay) That the Daughter hereby cannot contract Matrimony (*b*), unleſs the Father do ratifie the ſame (*c*); for thou ſhalt underſtand, that by the Civil Law (where this Caſe is put) the Child cannot contract Matrimony without the Father's conſent (*d*); but yet in this Caſe, if the Father ratifie the Contract, it ſufficeth (*e*). And this is the particular meaning of that general Concluſion, which how far it is diſtant from our Caſe, and impertinent, is eaſily diſcerned; for there the Parties themſelves contract Matrimony, and the Queſtion is, Whether the Fathers conſent may be ſupplied by Ratification? But here both of the Parties do not contract together, and the Queſtion is, Whether the Parties conſent may be ſupplied by Ratification? There the Mandate is general, but not revoked; here ſpecial, but erroneous and revoked; wherefore although Ratification be ſufficient in that Caſe, yet doth it not follow that therefore it ſufficeth in this Caſe (*f*).

(*a*) Vide Text. in d. L. generale. ff. de ritu nup.

(*b*) gloſſ. in d. L. generale.

(*c*) d. L. generale.

(*d*) Inſtit. de Nuptiis in princ. ibi dum tamen L. nuptus ff. de ritu nup.

(*e*) d. L. generale ff. de ritu nup.

(*f*) *Ex ſeparatis non infertur.* L. ultim. ff. de Calum. *Adde quòd omnis Doctor intelligendus eſt ſecundum legem quam allegat.* Jaſ. in L. filioſam. de leg. 1. ff. n. 129.

30. Thirdly, Where it is affirmed that the nullity or invalidity of an Act, occaſioned through the defect of Conſent, ſo ſoon as the Conſent cometh is purged, and the Act confirmed (*g*): That is true when both the Parties *afterwards* give their mutual Conſents, otherwiſe not (*h*). For Example; Two Children Contract Matri-

(*g*) Anchar. in c. ratihabitionem de Reg. Jur. in Sexto per c. 1. de deſponſ. impub. eod. lib. &c.

(*h*) d. c. 1. de deſponſ. impub & DD. ibidem. Covar. Tract. de Sponſ. prima parte, c. 5. §. 1. Felin. in c. ex parte Decani, de reſcrip. extra. n. 11. ampli. 4.

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mony together, this Contract is void for want of their consent (*i*); for Children can neither consent nor dissent (*k*); afterwards, when they be of ripe Age, they both mutually consent: By this Ratification the Contract is made good, and so is the former Conclusion to be understood (*l*): But if one of them alone should ratifie the former Contract, the other not, (as in our Case) it were to no purpose (*m*), and so this third Reason is of no force.

(*i*) c. ubi de desponsi. impub. extra.

(*k*) d. c. ubi L. ejus est nolle. ff. de Reg. Jur.

(*l*) Viz. *quod nullitas dispositionis ex defectu Consensûs provenientis, purgatur superveniente Consensu, ad cujus Conclusionis confirmationem* Anchor. allegat. c. 1. de desp. impub. in Sext. quod quidem c. loquitur, *ubi impuberes contrahunt, quorum nisi uterque post pubertatem consentiat, unius tantum Consensus nihil operatur*, DD. in d. c. 1. Covar. Tract. de Sponsal. prima parte, c. 5. §. 1. & infra.

(*m*) *Immo si pubes cum impubere contraxerit, qui factus pubes expressim ratificaverit, dissentiente tamen altero, & ad secundas Nuptias convolante, tenet hoc secundum Matrimonium, Testibus* Hostiens. in Tit. de desponsi. impub. §. quid juris. n. 15. & Covar. Tract. de Sponsal. prima parte, c. 5. §. 1. n. 8.

31. Finally, whereas it is concluded, That albeit the Error be such as doth destroy the Marriage, yet nevertheless, if when the Error is detected, the Party do ratifie and confirm the Contract, it is of no less force than if the Party had not erred (*n*). This Conclusion is true, if there be not somewhat else to hinder the effect of this ratification (*o*); and therefore if a Freeman marry a Bondwoman, although by the Civil (*p*) and Canon (*q*) Law, the Marriage be void, yet by the Man's ratification thereof, after the Error be detected, the Marriage is made good (*r*), as is aforesaid: And so likewise if the Man do err in the Person of the Woman, as did *Jacob* when he was married to *Leah*, instead of *Rachel* (*s*), yet ratifying the Marriage (as *Jacob* did) he confirmeth the same, and maketh it good (*t*), which otherwise was void and of none effect, by reason of the said Error (*u*).

(*n*) c. 2. de conjug. Serv. extra.

(*o*) vide Henr. Boic. in c. mulieres de Sen. ex extra.

(*p*) L. cum Ancillis. C. de Incest. nupt.

(*q*) c. 2. de conjug. Servorum extra.

(*r*) d. c. 2. de conjug. Serv.

(*s*) Genes. c. 29. versic. 20. cum sequen. Præpos. in c. proposuit. de conjug. Serv. extra. n. 4.

(*t*) d. c. 2. de conjug. Serv. & ibi DD. Præpos. Melchior Kling. Tract. de caus. matrimonial. fol. 11. *quem videas distinguentem.*

(*u*) c. 1. 29. q. 1. §. Sed error c. 2. de conjug. Serv. extra. Covar. Tract. de Sponsal. secunda parte c. 3. §. 7. n. 1. Summa Hostiens. Tit. de matrim. §. qualiter impediatur. Summa Rosella. verb. impedimentum. cl. 2.

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But whenas over and beſides his Error, there is *ſomewhat elſe* which doth hinder the force and efficacy of the ratification, then it is, as if there were no ratification (*x*): Now in our Caſe, the King of *Cyprus* did not only err in the Perſon of *Agneſia*, (if the Error were in her Perſon, and not in her Quality, *viz.* her Name and Age, whereof afterwards (*y*),) but before the Contract made he revoked the Mandate and Meſſenger; ſo that at the time of the Contract the King did not ſpeak by his Meſſenger (*z*), whereby ſhe the ſaid *Agneſia* was deceived (*a*); and therefore the King's ratification *alone* is not ſufficient to confirm the Contract (*b*), without the new Conſent of her the ſaid *Agneſia* concurring therewithal (*c*).

(*x*) Vide Boic. & Præpoſ. in c. propoſuit de conjug. Serv. extra.

(*y*) Infra.

(*z*) DD. maxime Bald. in l. multum. C. *Si quis alteri vel ſibi.*

(*a*) Præpoſ. in c. propoſuit de conjug. Serv. extra. col. pen. *& licet dici ſoleat quod dolus dans Cauſam contractui non habeat Matrimonium impedire, fallit tamen, ubi talis & tantus interfit dolus, utpote qui Conſenſum impediat.* lib. 1. conſil. matrimonial. conſil. ibidem 64. n. 14. Reuſner. de cauſ. matr. q. 7. n. 10. 39. (*b*) Anto. de Butr. conſil. 64. Anch. conſil. 228. Molin. in Themate, Conſil. Alex. 146. Felin. in c. ex parte Decani. de reſcr. extra. n. 10. & Præpoſ. ubi ſupra. (*c*) Dom. de S. Gem. in c. ultim. § ſane. n. 4. de procur. in Sext. Molin. ubi ſupra. & in nov. Intellect. in l. ſufficit. cum ſeq. de Sponſ. ff. Præpoſ. in d. c. propoſuit n. 10. in fin. Felin. in c. ex parte Decani. de reſcr. extra. n. 11. Ampl. 4.

32. Thus we ſee (to return to the general Queſtion) That if the Party revoke his Proctor, and afterwards ratifie the Contract made by him ſo revoked, this ratification doth not make good the Contract: Something (I confeſs) may be objected probably againſt the Reaſons of this Negative Concluſion (*d*), but not ſufficiently (*e*)

(*d*) *Veluti quod revocati Procuratoris acta tunc demum ratificari non poſſunt, quando revocatio facta fuit reſpectu ipſius actus, ſecus ſi intuitu perſonæ vel quando dubitat quo reſpectu.* Bald. in l. falſus C. de furto. *Item quod falſi Procuratoris ſeu Nuntij geſta non poſſunt ratificari, ubi verba Contractûs ſunt concipienda nomine abſentis; Id quod hic neceſſarium non eſt.* Alex. conſ. 149. vol. 5. *denique quod dolus non viciat matrimonium etiamſi det cauſam Contractui.* Abbas in c. cum dilectus. de his quæ vi metúſve Cauſ. extra. (*e*) *Nam quod ad primum fundamentum attinet, Mandatum revocatum fuit, non intuitu perſonæ procuratoris, ſed actûs; ſecundum autem fundamentum ſolidiſſimum permanet quicquid in contrarium objicitur; Nec valet iſtud Argumentum in contrahendis Nuptiis, Non opus eſt proferre verba in nomine Domini, Ergo ratificari poſſunt falſi Nuncij geſta. Poſtremò non tam adfuit dolus Regis quam abfuit Conſenſus Agneſiæ.*

in my Opinion; wherefore the same Conclusion hath place, not only when the Proctor is certified of the revocation, but also when he is ignorant thereof (*f*), as is aforesaid; nor then only when the Party doth by express words revoke his Proctor (*g*), but also when he doth any Act which doth imply a revocation, as when he doth make a second Mandate to contract Matrimony with any other Woman (*h*); nor then only, when the Party (which contracteth Matrimony with the revoked Proctor) is certified of the others error and revocation (*i*), but also whiles such error and revocation is yet unknown, may the same Party marry elsewhere, either before or after the ratification (*k*). Indeed, if both Parties, notwithstanding the said error and revocation, give their mutual Consents to be Man and Wife, the Contract is good from this time of their new Consent, but not from that time of their first Contract (*l*).

(*f*) c. fin. de procur. in Sext.
(*g*) Covar. Tract. de Sponsa. secunda parte, c. 4. n. 11. in princ.
(*h*) c. si duo. de procur. in Sext. Covar. ubi supra.
(*i*) Præpos. in c. 2. de conjug. Serv. extra. n. 10.
(*k*) Præpos. ubi supra.
(*l*) Præpos. ubi supra. DD. in c. ultim. de procur. in Sext. glos. in c. dilectus de Sponsa. in fin.

33. As by a *Proctor* (*m*), so by a *Messenger* (*n*), Spousals or Matrimony may be contracted betwixt them that are absent. Of Messengers there be two sorts (*o*): The one having a sufficient Mandate or Authority to deal in the behalf of the Party from whom he is sent: The other having no such Authority or Warrant, but imployed only about the Expedition of a bare Fact, as the delivery of a meer Message, or sole portage of a Letter, &c. (*p*)

(*m*) c. ultim. de procur. in Sext.
(*n*) L. sufficit. L. ultim de Sponsal. ff. Hostiens. Summa. Tit. de Sponsa. & Matrimonio §. qualiter extra.
(*o*) DD. in c. ultim. de procur. in Sext. & in L. Multum C. si quis alteri vel sibi.
(*p*) Ibidem.

34. Of the former of these, I have spoken before, for whosoever hath a sufficient Mandate to contract Matrimony, is usually called a Proctor *q*), although

(*q*) c. ultim. de procur. in Sext. Summa Silvestr. verb. matrimonium. §. 1. q. 9. n. 9. Summa Angel. verb. matrimonium. el. 2. n. 18. *Immo omnis Nuncius dicitur Procurator, sed non omnis Procurator Nuncius*, Bald. in L. multum. C. si quis alteri vel sibi. n. 7.

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in nature (ſo far as I can learn) he be nothing elſe but a Meſſenger (*r*), betwixt whom and a Proctor (properly underſtood) there is this notable difference often to be remembred ; The voice of the *Meſſenger* is the ſound of his Maſters Will (*s*), whoſe mind being uttered by the others Mouth (*t*), the Maſter is immediately tyed to the other Party, with whom the Contract is made; and which Party is likewiſe *directly* tyed and bound to the Maſter, by the promiſe made to the Meſſenger, as if the Parties themſelves were both perſonally preſent together, and with their own Mouths did ſpeak each to the other, and with their own Ears hear each other ſpeak (*u*): But a Proctor, albeit as a Proctor, and not in his own name, he do make any Contract with another Perſon, This Contract is originally *rooted* in the Proctor, and thence derived to the Maſter (*x*), who by the Civil Law hath no *direct* action againſt the other Perſon, for performance of the Contract without *Ceſſion*, or grant firſt made by the Proctor (*y*). The former of theſe two I may compare to a Merchants Prentice or Servant, the other to his Factor or Dealer beyond the Seas; The Apprentice having ſold and delivered his Maſters Wares forth of the Shop, the Merchant by and by hath a *direct* Action, and may in his own name proſecute againſt the buyer for the price thereof, as if he himſelf

(*r*) Covar. Tract de Sponſal. ſecunda parte c. 4. n. 8. in fin. Alex. conſil. 149. n. 14. Gem. Franc. & alij in c. ultim. de procur. in Sext.

(*s*) Bar. in l. qui autem §. conſtituere ff. de conſtit. pec. n. 3. Bald. in l. multum n. 4. C. *Si quis ſibi vel alteri.*

(*t*) *Quâ de cauſâ* DD. *communiter dicunt Nuncium eſſe picam ſeu organum quo Dominus vocem ſuam in alterius auditum transferat.*

(*u*) DD. in L. multum C. *Si quis alteri vel ſibi.*

(*x*) L. per procuratorem de procur. l. ſi procurator. cum LL. ſeq. mandati L. poſſeſſio quouſque. §. & ſi poſſeſſio. de acquir poſſ. ff.

(*y*) *An autem ex Contractu Procuratoris vel Nuncij acquiratur nobis actio ipſo jure, vel mediante ceſſione, ſi quis ſcire cupiat*, Angelum *velim perlegat ſic diſtinguentem. Si aliquis contrahit ut Nuncius, Domino acquiritur Actio directa, Si ut Procurator, tunc aut eſt ſubjectus Domini poteſtati (veluti filius vel ſervus) & acquiritur Domino abſque alia conceſſione, aut omnino eſt illius poteſtati Subditus : Et tunc quoad jura realia, facta ſcilicet, vera traditione Procuratori, acquiruntur dominium & poſſeſſio, abſque aliâ ceſſione ; quoad verò actiones perſonales, ſi contrahit præſente Domino, Domino quæritur Actio ſine ceſſione, quod ſi abſente eo contrahit, tunc aut ſuper re Domini, aut ſuper alia re, re Domini venditâ, quæritur Domino utilis, ſine ceſſione actio, In altero Caſu ſemper eſt neceſſaria ceſſio.* hæc Angel. in L. multum C. *ſi quis alteri vel ſibi, &c.*

had sold and delivered the Wares (z); But if the Factor (a) buy or sell Wares beyond the Seas, by the Civil Law, the Merchant hath no direct Action against the Buyers and Sellers in that behalf (b); (except in certain Cases)(c); and therefore if he will sue them, the Action being first grounded in the Factor, must be derived or translated to him by *Cession* from the Factor, e're he can prosecute the same himself (d): Hence it is that the Acts of a revoked Messenger are utterly void, albeit he be not certified of the revocation (e); but the Act of revoked Proctor is good until he be certified thereof (f), as is aforesaid.

(z) *Sicut enim qui servum proprium Institorem proposuit, sibi acquirit actionem, attenta Juris Civilis dispositione* L. 1. de institor. actione ff. *Ita qui famulum ad merces vendendas etiam liberum constituit (respectâ lege Regni nostri municipali) Id quod nostratibus notissimum est.*

(a) *Per Factorem, Institorem intellige, quos enim Jus appellat Institores Vulgus nuncupat Factores,* Wesemb. in tit. de Institit. actione. ff. in princ. Capyc. dec. 180. & decis. Gem. c. 14. n. 43. (b) *Utcunque enim qui Institorem præposuit poterit conveniri, convenire tamen nequit, Si vel liberum hominem, vel etiam servum alienum Institorem habeat* L. 1. ff. de Institor. act. (c) Wesemb. in Tit. de Institor. act. ff. L. Julianus. §. Si Procurator. de action. Empti ff. & ibi DD. (d) L. 1. de Institor. act. ff. & ibi Bar. Bald. Castrens. & alij. (e) c. ultim. de procur. in Sext. & ibi Dominic. de S. Gem. Phil. Franc. & Anch. (f) c. mandata de procur. extra. L. Si mandassem ff. mandati c. ex parte Decani de rescr. extra.

35. When as the Messenger hath no Mandate, being charged only with the bare dilivery of a Message or a Letter, divers questions are moved. First, what if the Party to whom the Message or Letter importing Consent of Matrimony, being delivered, do immediately upon the receipt thereof express the like Consent, Whether is the Contract hereby fully finished? Or whether is it to be expected, that the Party which sent the Letter or Message do first understand thereof, and approve the same?

36. The Answer is, That albeit, it may seem at the first view that the Approbation of the Party which, sent the Letter or Message is to be expected (g), because as yet there doth not appear a Consent, that is, a mutual agreement at one instant, without the which there cannot

(g) Vide Angel. de Clavas. verb. Matrimonium el. 2. n. 21.

cannot be a perfect Contract (*h*), in as much as one of the Parties doth consent at one time, and the other Party at another time; yet nevertheless, because the Party which did first consent is still presumed to continue and persevere in the same Mind, until the time of the others Consent (*i*), as hath been heretofore declared, it followeth, that there is a mutual Consent at one and the same instant (*k*); By which mutual Consent the Contract is fully perfected and finished (*l*): Whereupon it is concluded by the general Consent of such as do handle this question, that as soon as the Party, to whom the Message or Letters of Matrimony is sent, doth condescend thereunto, by expressing like Consent as the Message or Letters do import (whether it be Matrimony or Spousals only), The Contract is by and by perfect, without any expectation (*m*); unless it appear that the Party which sent the Message or Letter did dissent before the others Consent (*n*); but if this appear not, then albeit privily the Party indeed dissent, yet for defect of proof it shall be adjudged, as if the Party had not at all dissented (*o*): *Idem est non esse & non apparere* (*p*), Not to be, and not to appear, is all one in Construction of Law.

(*h*) c. Tuæ de Sponsal. extra.
(*i*) *Id quod præcedit etiamsi is qui procuratorem misit, nec consentiat nec dissentiat, nec interim de eâ re cogitet.* Hostiens. in Rub. de Sponsal. §. qualiter. col. 2. Prier. verb. matr. el 5. q. 11.
(*k*) *Siquidem ubi est Continuatio Consensus, ibi Consensus dicitur esse simultaneus,* Teste Zasio con. fil. 5. lib. 2. n. 22.
(*l*) Summa Angel. verb. matr. el. 2. n. 21. versic. Sed nunquid.
(*m*) Zas. consil. 3. n. 8. & consil. 5. n. 6. vol. 2. Summa Angelic. ubi supra Anchor. consil. 228. Butr. consil. 64. Summa Rosella verb. Matr. el. 2. sed cum non. Tract. de Sponsal. fol. 25. n. 19. Summa Angel & Summa Rosella ubi supra. Rosella, loco prælleg. Anto. Gubert. tract. de Sponsal. fol. 25. n. 19. Bar. de contrah. end. Emp. ff.
(*n*) Anto. Guber.
(*o*) Summa Rosella, loco prælleg. Anto. Gubert. tract. de Sponsal. fol. 25. n. 19.
(*p*) L. in lege & ibi Bar. de contrah. end. Emp. ff.

37. Secondly, It is demanded whether the Woman may contract Matrimony by a special Messenger or Letters, as well as the Man? To this question it is answered, That albeit by the Civil Law it seemeth that she cannot (*q*); Yet nevertheless by the Canon Law (which Law prevaileth in this Case) (*r*), it is concluded that she

(*q*) *Jure enim civili non videtur uxor esse nisi deducatur in Dominium Viri.* L. mulierem & L. seq. ff. de ritu nup.
(*r*) L. 1. Consil. Matr. consil. 25. n. 2. communiter Canonistæ in c. In præsentia de Sponsal. extra. Schneid. tract. de Nuptijs fol. 48. n. 13.

may

may (*s*); and that there is no difference of Sex, in this reſpect (*t*).

(*s*) Benedic. de Caper. Theſaur. com. opin. verb. Lex. n. 23.

(*t*) Hoſtienſ. in Rub. de Sponſal. §. qualiter verſic. *Hoc tamen ne, viz. ad imparia judicentur vir & uxor.* Summa Hoſtienſ. ubi ſupra. per c. Gaudemus. de divortiis extra.

38. Thirdly, What if one Man hearing another ſay, [*that he hath a great affection towards ſuch a Woman for Marriage; or that he will have her for, or to his Wife,*] do thereupon of his own accord and proper motion, go unto her; and declaring what he had heard, contract Matrimony with her in the other Mans name, Whether is this a good Contract, yea, or no? It is anſwered that it is not (*u*), for a Meſſenger muſt be *ſpecially ſent* for that purpoſe (*x*).

(*u*) lib. 2. conſil. Matr. conſil. ibidem 17. n. 4. verſ. quod autem.

(*x*) d. conſil. per. gloſſ. in l. 1. in fin. de contrah. Emp. ff. & gloſſ. in L. conſenſu ff. de act. & oblig. lib. 1. conſil. Matr. conſil. ibidem. 83. n. 13.

39. In contracting Matrimony or Spouſals by Letters, this one thing principally is to be obſerved, namely, That as it is neceſſary for that Party, which ſendeth the Letters containing words fit for Spouſals or Matrimony, [*As I promiſe hereby that I will*, or *that I do take thee to my Wife*, *&c.*] do ſtill continue in the ſame mind without alteration, until the time of the others Conſent (*y*): So on the other ſide, it is neceſſary, that that Party to whom the Letters are ſent, upon receipt thereof, or ſhortly after do expreſs the like Conſent, either to him which brought the Letters or to ſome others, or elſe by Letters to the former Party (*z*), which thing being performed on either Party, the Contract is good (*a*): But if either the Party which ſent the Letters

(*y*) Summa Angelic. verb. Matrimonium. el. 2. n. 20. Zaſ. conſ. 5. n. 6. verſic. & quidem & in 7. vol. 2.

(*z*) Summa Angelic. & Zaſ. ubi ſupra. *Idem* Zaſ. conſil. 2. n. 26. lib. 2. conſ. Matrimonial. conſil. ibidem 10. n. 2. Silveſtr. Prier. verb. Matrimonium. el. 5. q. 12. Dom. de S. Gem. in c. ultim. de procur. in Sext. §. ſane n. 3. Archid. in c. nec. illud. 30. q. 5. n. 4. & 5. (*a*) ubi ſupra & facit c. honorantur. 32. q. 2. Pariſ. conſil. 55. vol. 4. n. 8. Archid. & DD. in c. ultim. de procur. in Sext.

repen-

repent in the mean tim (*b*), (which thing notwithſtanding is not preſumed, unleſs it be proved (*c*)), or the Party which received the Letters, do not then, or ſhortly after (*d*) the receipt thereof, deliver expreſly like mutual Conſent, it is in effect, as if neither of them had ever conſented (*e*); if the Party delivering the Letters do inwardly repent, or the Party receiving the Letters, do in heart conſent (howſoever towards him which is the Searcher of the Heart, there is no difference betwixt ſecret and manifeſt Repentance, or manifeſt and ſecret Conſent), yet towards his Church, and by Conſtruction of Law, this inward Repentance of the one, or ſecret Conſent of the other is not regarded, when it is not proved (*f*); Although by the Opinion of ſome it may ſeem, that if the Party receiving and reading the Letters, do not expreſly contradict or diſſent, it is of like force, as if the Party had expreſly conſented (*g*): But I dare not deliver this Opinion for currant; For what if for modeſty or other like Conſideration, the Party think good not to reveal the ſecrets of the Letter; Surely he were very haſty, or rather Captious in my Conceit, that would account this modeſt or diſcreet Silence, for a reſolute Conſent (*h*; eſpecially in a matter of ſuch moment, as Matrimony, than which there is not any Action of greater moment in this life (*i*);

(*b*) Arg. c. ultim. de procur. in Sext. Pariſ. de conſil. 55. n. 8, & 9.

(*c*) Hoſtienſ. Summa Tit. de Sponſal. §. qualiter Silveſter. Prier. verb. Matrim. §. 5. q. 10. Zaſ. conſ. 5. n. 6. vol. 2. Dom. in c. 2. Menoch. de præſump. lib. 6. præſump. 31.

(*d*) Zaſ. conſ. 5. n. 20. vol. 2. Anto. Quætta. lib. 2. conſil. Matrimonial. conſil. ibidem. 13. n. 18, 19, 20. Summa Angelic. verb. Matrimonium. el. 2. n. 20.

(*e*) Zaſ. ubi ſupra. Pariſ. conſil. 55. vol. 4. n. 8, & 9. Prier. verb. Matrimonium. el. 5. q. 12. Dom. ubi ſupra & Archi. ubi ſupra.

(*f*) Prier. verb. Matrimonium el. 5. q. 12. Summa Roſella verb. Matrimonium. el. 2. verſ. ſed cum Summa Hoſtienſ. Tit. de Sponſal. §. qualiter. col. 2. c. honorantem. 32 q. 2. & ibi DD. Ætiologia eſt, Eccleſia non judicat de occultis c. conſuluiſſe 2. q. 5. (*g*) Auguſt. Berous in ſubſcriptione ad Conſil. Zaſij lib. 2. conſil. 4. col. pen. verſ. adhæreo per l. ſi filius fa. el. 2. de S. Cto. Macedon. & ibi Saul de Caſt. Par. in L. Titius de conſtitut. 5ec. & in l. quo enim §. 1. Rem rat. hab. ff. & facit clem. 1. de procur. (*h*) Archid. in c. nec. illud 30. q. 5. n. 3. & 5. Dom. de S. Gem. in c. ultim. §. ſanè de procur. §. n. 3. Prier. verb. Matrimonium. el. 5. q. 12. Summa Angelic. verb. Matrimonium el. 2. n. 20. Zaſ. conſil. 5. n. 6, & 7. vol. 2. *Baptiſta in Summâ quæ dicitur Roſella.* verb. Matr. el. 2. verſic. *Sed cum non ſufficiat, Qui omnes uno ore concludunt Conſenſum non ratificatum nihil operare, Quantum autem ad authoritates in Contrarium productas, maxime vero ad* L. Si filius fa. el. 2. de S. Cto. Maced. ff. & ad clem. 1. de procur. reſpondet per Bald. in L. 1. mandati ff. vel dic. ut per Molin. in addic. ad Alex. conſil. 78. (*i*) Gloſſ. & DD. in c. Mulieri de jure jur. extra. Bald. in L. bonæ fidei C. de reb. cred. & in 9. ad noſtram de probac. extra. Zaſ. conſil. 5. vol. 2. n. 25. cum ſeq.

and

and therefore not to be undertaken ſuddenly, or concluded without due premeditation or deep deliberation (*k*).

(*k*) c. qui Sitit. 33. q. 5.

40. If any object this Rule, *Qui tacet conſentire videtur* (*l*). To him might be objected the very next Rule following, *Is qui tacet non fatetur, ſed nec utique negare videtur* (*m*): But becauſe the *Brocardes* or contrary Concluſions, rather breed brabbles, than pacifie Contentions, this I think a more indifferent anſwer: In ſtrict and proper ſignification, he which holdeth his peace, doth neither conſent nor diſſent (*n*); Nevertheleſs in Conſtruction or interpretation of Law, he is ſometimes ſaid to *conſent* according to the former Rule; and ſometimes not, according to the ſecond Rule (*o*): The affirmative Rule hath place, when the matter tendeth altogether to the benefit and favour of the Party (*p*), for then to be ſilent is to conſent, except in certain Caſes (*q*); but the Caſe being altered, the Law is likewiſe altered; for if the matter be ſuch as may be greatly prejudicial to the Party, then the negative Rule hath place, that is to ſay, To be ſilent, is not to conſent. Now it is generally concluded; that Matrimony is a matter of very great prejudice, and a kind of *Servitude* or *Bondage* (*s*); Inaſmuch as thereby, aſwel the Husband as the Wife are deprived of their former liberty, and power over their own Bodies; for after they be Married, the Husband hath now no power over his own Body, but the Wife (*t*); neither the Wife over her own Body, but the Husband (*u*). Yea, and (as *Baldus* ſaith) it is *Dura Servitus*, a hard Servitude, becauſe it is for ever indiſſoluble (*x*), how hard ſoever the Match be; whereas every other Servitude, may at any time be diſſolved, the Lord or Maſter

(*l*) c. qui tacet de Reg. Jur. lib. 6.

(*m*) c. is qui eod. tit.

(*n*) Felin. in c. Nonne de præſump. extra. n. 5. verſ. prima regula, &c. *Eſt enim tacere medium quoddam inter expreſſam voluntatem & contradictionem.*

(*o*) Felin. in d. c. Nonne. ubi ponit quatuor regulas cum ſuis fallentijs.

(*p*) Panor. & Canoniſtæ in d. c. Nonne. Bart. & Legiſtæ in l. quæ dotis ff. Sol. Matr.

(*q*) Felin. in d. c. Nonne. n. 20, &c.

(*r*) Canoniſtæ in d. c. Nonne. Legiſtæ in d. L. quæ dotis. Quibus adde Peckium in c. Is qui de Reg. Jur. C. in Sext.

(*s*) L. 2. de libero hom. exhibend. ff. (*t*) Epiſt. 1. ad Corinth. c. 7. verſ. 3. (*u*) Ibidem. (*x*) Bald. in L. In bonæ fidei C. de reb. cred. n. 1. verſic. Item in Cauſis.

be

being pleaſed. I confeſs there be many good things in Marriage (*y*); and that there is one Author who hath reckoned an hundred Commodities iſſuing from Marriage (*z*); but the ſame Author hath alſo numbred two hundred Diſcommodities thereto belonging (*a*): Wherefore in a matter ſubject to ſo many perils, and ſo great prejudice, it ſavoureth not of Equity, that Silence ſhould be reputed for Conſent (*b*), except as elſewhere is declared (*c*).

(*y*) Neviza. in Silva nuptiali. §. eſt nubendum fol. 203. cum ſequen.
(*z*) Gilbertus in queſtion. Oeconomic.
(*a*) Idem Gilbertus ubi ſupra.
(*b*) Archid. in c. nec illud. 30. q. 5. Gem. in c. ultim. de procur. in Sext. Summa Angel. & Roſella. verb. matrimonium. el. 2. Zaſ. conſil. 5. n. 6. & 7. vol. 2. Prier. verb. matrimonium. el. 5. q. 12.
(*c*) Viz. *ubi parentes contrahunt præſentibus & tacentibus liberis.* c. 1. §. 1. de deſponſ. impub. in Sext. ut ſupra. §. 11.

41. Again, If that Opinion were true, to wit, That the Party receiving the Letters, and not contradicting the ſame, were to be judged to have conſented thereunto (*d*), yet there be divers things requiſite to work that Effect (*e*). Firſt therefore it muſt be proved by ſufficient Witneſſes that the Party did read the Letters (*f*). Secondly it is requiſite that the Witneſſes did underſtand the tenor thereof (*g*); for if it be not proved that the Letters were read, the Party is preſumed to be ignorant of the Contents thereof (*h*), and being ignorant cannot conſent thereunto, ſince nothing is more contrary to Conſent than Ignorance (*i*); or the reading of the Letters being proved, if the Witneſſes did not underſtand the Contents of the Letters, they are not able to depoſe concludently (*k*), ſeeing it may be ſome other Letter than they imagined, which the Party received and read (*l*).

(*d*) *Quam tamen non puto omnino veram in præpoſitâ facti ſpecie.*
(*e*) Ut per Maſeſil. notab. 22. Cœpol. cautel. 9. & Franciſ. Ripam. in c. cum M. de conſtitut. extra. n. 132.
(*f*) Matheſil. Cœpol & Ripa ubi ſupra. gloſſ. in clem. 1. de procur. Auguſtin. Berous in Subſcrip. conſil. 4. Uldalrici Zaſij vol. 2. Alex. in L. quo enim §. 1. ff. rem rat. hab.
(*g*) ibidem.
(*h*) Matheſil. d. notab. 22. Gabriel. l. 1. com. concluſ. Tit. de præſump. concl. 2. n. 11.
(*i*) L. Ignorans. C. de Dom. L. ſi per errorem. de Juriſ. om. Jud. ff.
(*k*) Zaſ. d. conſ. 4. vol. 2. in Subſcrip. Matheſil. d. not. 22.
(*l*) *Traditur igitur Cautela, ut literas tranſmiſſurus, eaſdem in præſentiâ teſtium ſcribat, & Copiam (ut dicunt) earundem eiſdem tradat, ac illoſmet Latores faciat, ut in eorum præſentia lectio fiat.* Ripa. in d. c. cum M. n. 132. poſt Cœpol. d. Cautel. 9. & Matheſil. d. not. 22.

42. What if the Party which sent the Letters, expressing an assured Promise of Matrimony, after the Woman have received the same, and yielded her full Consent thereunto, misliking the Match, deny that he wrote or sent any such Letters, and there be no Witnesses to prove the same, Whether is proof made by Comparation or Similitude of hands, a full and sufficient proof, yea or no?

43. Some say it is not (*m*), becaufe not only many mens hands are oftentimes fo lively counterfeited, as the Witneſſes viewing and comparing the ſame are very hardly able to diſcern betwixt the true and counterfeit Writing (*n*), but alſo for that no Man doth always write like unto himſelf (*o*): For Example; That which is written haſtily, is not like that which was written leaſurably, yet both of one hand (*p*); a Sick man's hand is not like his own hand written in health; and diverſity of Pens makes one man's writing ſeem to be of divers mens hands (*q*); by occaſion whereof they conclude, That the proof made by comparing of hands, is but half a proof (*r*); Others are of a contrary Judgment (*s*), affirming, That although in other Writings, as Bills and Obligations, *&c.* wherein Witneſſes be commonly required, proof by Collation of hands be but half proof (*t*), in which Caſe only the former Opinion proceedeth; yet in other Writings (*u*), where Witneſſes are not uſu-

(*m*) Alex. conſil. 76. vol. 3. n. 8. & 9. Molin. in apoſtil. ad Alex. conſil. 114. vol. 7. Hyppol. in Rub. de prob. C. n. 289. Panor. in c. 2. de fide inſtr. extra. n. 8. verſ. Sed certè Jaſ. in rep. L. admonendi ff. de jurejur. n. 139. Bald. & Sal. in L. in fin. C. de Ed. di. Adr. toll.

(*n*) Panor. in d. c. 2. de fid. Inſtr. n. 8. & Jaſ. in rep. L. admonendi ffde jurejur. n. 139. in fin.

(*o*) Maſcard. de probat. verb. comparatio. n. 1. & 2. gloſſ. in Anthen. de trich. & ſemiſſ.

(*p*) *Idem quoque ſi manus aliquo vpere (ut contingere ſolet) priùs defatigata fuiſſet.* Anto. Gravat. in Addic. ad veſtrium. in ſua praxi. lib. 6. c. 1.

(*q*) ibidem.

(*r*) Panor. in d. c. 2. de fide Inſtr. extra. n. 8. Hyppol. in Rub. de probat. C. n. 289. Jaſ. in Rep. d. L. admonendi. n. 139.

(*s*) Bar. in L. nuda ratio. ff. de donac. n. 7. Alex. conſil. 114. vol. 7. n. 4. Anto. Grava. in Addic. ad praxim octav. veſtrij. lib. 6. c. 1. n. 27. Tindar. Tract. de teſtibus. lib. 2. c. 8. n. 7. Lanfranc. in c. quoniam con. §. Inſtrumentorum. n. 49

(*t*) Anthen. & ſi contractus. C. de fide Inſtr. Bar. in d. L. admonendi. n. 26. & in d. L. nuda. n. 6. Felin. in c. 2. de fide Inſtr.

(*u*) *Siquidem ut verior ita & communior opinio eſt, quòd* L. comparatio, C. de fide Inſtr. *non eſt correcta in Epiſtola, Teſte* Maſcard. de probat. concl. 330. n. 23. in fin.

ally

ally called (as Epiſtles and private Letters (*x*),) this proof by Comparation is to be taken for a full ſufficient proof (*y*), otherwiſe it were impoſſible to prove any ſecret Contract by Letter, to be written by the true Author (*z*).

(*x*) *Quomodo enim poteſt ille, cui tranſmittantur literæ, adhibere teſtes ad proband', per quem fuerunt ſcriptæ, ergo in-*

tuitu, iſtius difficultatis, facilius traditur comparationi, Fulg. Paul. de Caſtr. & Alex. in d. L. admonendi. Maſcard. Tract. de probat. concl. 330. n. 12. Vivius Theſaur. com. op. verb. Comparatio. (*y*) Vivius d. verb. Comparatio. Fulg. Caſtrenſ. Alex. & Rip. in d. L. admonendi. Gravat. in. add. ad veſtr. lib. 6. c. 1. n. 27. *per quem potest hanc opinionem communiter obſervari in praxi.* (*z*) Maſchard. de probat. concl. 330. n. 12.

44. A third ſort more indifferent, leave it to the diſcretion and Conſcience of the Judge (*a*), who upon due Conſideration of the ſtate and condition of the Parties, and of the circumſtances and merits of the Cauſe, together with the likelyhood or unlikelyhood thereof, can better and more certainly determine of the ſufficiency or inſufficiency of the foreſaid proof, than can be generally preſcribed, without particular view of the Premiſſes (*b*): In which contrariety of Opinions, I do think, that the Judge, unleſs by diligent Examination of the Fact he be otherwiſe induced, or perſwaded by ſome ſpecial preſumption, or ſuſpition of ſiniſter dealing, he is to follow the common or moſt received Opinion (*c*), which is, That proof made by comparing or conferring of hands is of it ſelf a full and ſufficient proof (*d*); the Comparation or Collation being duly and orderly made, that is to ſay, theſe Requiſites or Obſervations following being performed (*e*).

(*a*) Menoch. de Arbitr. Jud. lib. 2. c. 114. n. 24. Dec. conſil. 219. in fin. Covar. Tract. lib. pract. q. c. 22. n. 7.

(*b*) Covar. d. c. 22. quem vide.

(*c*) Coraſ. Tract. de com. op. lib. 2. c. 1.

(*d*) Maſcard. de probat. concluſ. 330. n. 12.

(*e*) Zaſ. de conſ. 4. vol. 2. in fin.

45. Firſt of all therefore (as touching the Order and Form of this Comparation of hands) it is requiſite that two Writings be produced and exhibited, namely, the Letter it ſelf containing the Promiſe of Matrimony, being the Writing in Controverſie, and another Writing, being certainly and without diſpute or controverſie of the

(*f*) Bar. in L. comparationes. n. 1. Bald. n. 5. Angel. n. 5. Castrens. n. 3. C. de fide Instr. Zas. de cons. 4. in fin. Panor. in c. 2. n. 13. de fide Instr. extra.

(*g*) Sichard. in d. L. comparationes. n. 17.

(*h*) Bar. Bald. Angel. Castrens. Sichard. & alii in d. L. comparationes. Ripa. in L. admonendi. de Jurejur. ff. n. 108.

(*i*) DD. in d. L. comparationes. Menoch. de Arbitr. Jud. lib. 2. caf. 114. n. 29.

(*k*) Bald. in d. L. comparationes. n. 5.

(*l*) Angel. in d. L. comparationes connex. Anth. & si contractus. C. de fide Instr.

(*m*) Sichard. post alios. in d. L. comparationes. Menoch. de Arbitr. Jud. caf. 114. n. 29.

Parties hand (*f*); for according to the Rules of Logick, *Id quod probat, debet esse certius & clarius eò, quod probandum est* (*g*); That which doth prove ought to be more certain, than that which is to be proved: Of which two Writings, the one, that is the clear and undoubted Writing, is termed *Scriptura à quâ*, the other *ad quam* (*h*), because from this faithful Writing (as from a trusty Interpreter which will not lye) Collation or Comparation is made unto that other Writing in controversie (*i*), for trial whether it be a Counterfeit or not; In which respect also the one Writing is called the *Agent extream*, and the other the *Patient extream* (*k*): The Agent is produced to prove the Identity of the other Writing: The Patient is that whose Identity is to be proved, and which is used for the obtaining of that which is demanded (*l*). But as *Mercury* is not made of every Wood (according to the old Proverb) so every Writing is not fit to be that fundamental Writing *à quâ*, or *Agent extream*, from the which Comparation is to be deduced (*m*); For what if the Writing, which is to be used as a true Touchstone, stand in need it self to be touched or compared, I mean, what if it cannot otherwise appear to be of the Parties hand, but by Comparation of other Writings? Surely this Writing is utterly unfit for this purpose (*n*), for that were to prove *ignotum per ignotius*, and to protract the matter *in infinitum*, always abiding and dwelling upon uncertainties (*o*).

(*n*) Menoch. d. caf. 114. n. 29. in fin.

(*o*) Menoch. d. caf. 114. n. 30.

(*p*) Julianus præfectus prætor. in Text. L. comparationes. §. Ideoque Sancinus C. de fide Instr.

46. In ancient time therefore, so precise were the Law-makers in this Case, that they did admit no more but three kinds of Writings, from the which Comparation might be made (*p*), *viz.* a Writing subscribed by three

three Witneſſes, (two of them at leaſt teſtifying the ſame) a Judicial Writing, that is, ſome Act written before a Judge; and a publick Inſtrument or Writing made in Solemn Form, by a publick Notary (*q*), whereunto afterwards two others were added (*r*), *viz.* that the Writing produced there be confeſſed by the Party (*s*), and the Writing extracted from ſome Regiſter or Place where faithful Records be kept (*t*). Howbeit at this day, by the common Conſent of the beſt Writers, any manner of Writing, either Publick or Private, Judicial or Extrajudicial, of what nature or quality ſoever, (ſo that it appear undoubtedly to be of the Parties hand) is ſufficient to be the *Agent extream*, or Writing from the which Comparation is to be made (*u*); or if there be no ſuch Writing at all, the Judge may *command* and *compell* the Party to write, that thereby (Comparation being made) the truth may appear, whether both the Writings be of one hand, or not (*x*).

(*q*) d. §. Ideoque. & §. etenim in d. L. comparationes. & ibi Bald. n. 8.

(*r*) Anthen. Adhæc. C. de fide Inſtr.

(*s*) Anthen. adhæc. in princ. Sichard. in d. L. comparationes. n. 7. in fin. Bar. in Anthen. & ſi contractus C. de fide, Inſtr. n. 2. *Quinimo idem juris eſt, ubi quis expreſſè confitetur Scripturam eſſe ſuam, nec mirum cum expreſſa confeſſio ſit fortior tacitâ.* Bald. in d. L. comparationes n. 10. Menoch. de Arbitr. Jud. Lib. 2. caſ. 114. n. 29. verſic. Sumeretur, Cravetta conſil. 216. n. 18. Paul. de Caſtr. conſil. 312. vol. 2. n. 3.

(*t*) d. Anth. Adhæc. *Quod ſi quis objiciat hanc additionem eſſe ſuperfluam, & comprehendi ſub tertio genere Scripturarum, de quo in d. L. comparationes; Reſpondeas quod quamvis* Text. in d. Anth. *dicat Literas ex Archiepiſcopo productas habere teſtimonium publicum, per hoc tamen non ſequatur ipſam Scripturam eſſe publicam, utpote quæ carens publici Inſtrumenti ſolemnitatibus; Nihilominus in loco publico recondita, & per miniſtrum publicum regiſtrata, non immeritò publicum teſtimonium prohibeat.* Bart. in d. Anth. & Sichard. in d. L. comparationes. n. 8. & 9.

(*u*) Sichard. in d. L. comparationes. n. 10. poſt Sabir. ibidem col. 4. Ripa. in L. admonendi. de jurejur. ff. n. 111. Menoch. de Arbitr. Jud lib. 2. caſ. 114. n. 29. verſ. Sumeretur. Cravetta. conſil. 216. n. 18.

(*x*) Bald. in L. comparationes. C. de fide Inſtr. n. 10. Panor. in c. 2. de fide Inſtr. extra. n. 13. Ripa. in L. admonendi. n. 110. ff. de jurejur. & Latè Menoch. de caſ. 114. n. 12. Bart. autem in Anth. & ſi contractus. C. de fide Inſtr. contrarium tenuit, *Cui* Baldus *ob eam rem inurit maculas Erroris, quam* Zaſ. (lib. 2. ſing. reſponſ. c. 25.) *diluere tentavit, ſed fruſtra; nam ſi Judex poſſet compellere partem, ut reſpondeat probationibus adverſarij, ad relevandum eum ab onere probandi, à fortiore poteſt partem compellere ad ſcribendum, ut inde fiat comparatio, Inquit* Panor. in d. c. 2. poſt. Card. ibidem & Paul. de Caſtr. in d. L. comparationes in fin.

47. Secondly, It is requiſite that the Party which procureth this Comparation, do ſwear, That he hath not any other fit or ſufficient proof (*y*), and that he hath not done, nor endeavoured any thing thereabouts, which peradventure might ſuppreſs or hide the truth (*z*).

(*y*) Anth. Tit. de Inſtr. fide & Cautel. §. Si verò nihil gloſſ. in d. L. comparationes in fide, *unde patet quòd comparatio eſt remedium ſubſidiarum, non aliter competens quam quando non aliter ſit probatio.* Zaſ. d. conſil. 4. in fin.

(*z*) d. §. Si vero nihil. Sichard. in d. L. comparationes. n. 2. *Id quod pro mirabili traditur, & ſingulari nimirum, ut bis de Calumniâ in eadem Cauſa juretur.* Gloſſ. in d. L. comparationes. in fin. *atqui ratio iterati juramenti eſt, quia etſi quis in genere juraverit ſe nullam admiſſurum Calumniam; Tamen illud ſpeciale Juramentum, altiùs animâ inſigitur, & magis afficit ſemper, cum magis timerentur ea, quæ in ſpecie fiant, quam quæ in generali.* Gloſſ. in §. Si verò moriantur. Anth. de Inſtr. Cautel. & fide Sichard ubi ſupra.

48. Thirdly, It is requiſite that the Notaries or others skilful in writing, to whom the Judge doth commit this Comparation, be ſworn, That they ſhall not do any thing therein either for favour or gain, or fear or diſfriendſhip, or other ſiniſter affection (*a*), but that they ſhall uprightly and diligently view the Writings, and compare them indifferently, and then make true relation to the Judge what they have done, and what they judge or believe (*b*) in their skill, concerning the identity or diverſity of the hands.

(*a*) L. comparationes. C. de fide Inſtr. *Sed annon ipſe Judex debet per ſe facere comparationem? Dic quod debet quidem per ſe, adhibitis tamen Noſtratiis & ſcribendi peritis.* Sichard. poſt Ang. in d. L. comparationes.

(*b*) *Nam quum decipi poſſint ſimilitudine tractatus jurabuni, non de veritate præciſâ, Sed de credulitate tantùm.* Sichard. ubi ſupra.

49. Fourthly, It is requiſite that theſe Notaries or skilful Perſons, in viewing and comparing theſe foreſaid Writings, do not only conſider the ſimple Letters or Grammatical Elements, ſubject to Corporal ſenſe, but alſo the Stile and Phraſe thereof, ſubject to Reaſon and underſtanding (*c*); for as a Bird is known by her Tune, or a Harp or other Inſtrument by the ſound, ſo by the Conſonance of the Stile we may judge probably of the Author (*d*).

(*c*) Bald. in L. comparationes C. de fide Inſtr. n. 18. Menoch. de Arb. Jud. lib. 2. caſ. 114. n. 31. Sichard. in d. L. comparationes. n. 11.

(*d*) Bald. ubi ſupra.

50. Fifth-

50. Fifthly, It is requiſite that theſe aforeſaid Notaries and Writers make relation or report unto the Judge (by virtue of their Oaths) of their Proceedings, and what they have done or deemed, and judge of the Similitude or Diſſimilitude of the foreſaid Writings (*e*): Others have added other Requiſites, namely, That relation being made by the Notaries and Witneſſes of the ſimilitude of the Hands, the Judge ought to interpoſe his interlocutory Sentence of the Identity of the Writings, that is to ſay, that they were both written with one Hand (*f*).

51. Some alſo have been of this mind, That whereas there be five kinds of Writings above recited, whereby Comparation might be made, in their Opinion, not only all other kind of Writings were excluded (*g*), but alſo the Writing in Controverſie could not be compared but by another Writing of the ſame kind; as if the Writing in Controverſie were a publick Writing, then to be tried by a publick Writing; if a private Writing, then by a private Writing, &c. (*h*) Howbeit this Opinion is generally condemned; for any kind of Writing in queſtion may be tried by any other kind of Writing, being without queſtion of the Parties hand (*i*).

(*e*) *Creditur tamen ſufficere, quod ſemel juravit antequam comparationem faciunt, ideoque non eſſe neceſſe ut nunc denuò tempore relationis, ſecundum juramentum ſubeunt*, Menoch.d.caſu.114. n.28.

(*f*) Scil. in d. L. comparationes col. pen. Menoch.d.caſ. 114. n.32.

(*g*) Salic.ubi ſupra. Cur. Sen.in L. admonendi. de jurejur. ff. n. 114. Menoch. de caſ.114.n.32.

(*h*) *In quâ opinione ſteterunt* Bar.in Anth. Et ſi contractus C.de fide Inſtr. n. 2. & Angel. in L. eod Tit. n.8. Quibus ſubſcripſit Auguſtinus Berous in Addic. ad Zaſ. conſil.4. vol. 3. & Pariſ.conſ.19. n.38.vol.3. (*i*) Hugolin.de quo Sichard.in d.L. comparationes n.9. & alii de quibus Bald.ead L.n.11.

52. Finally, There is to be noted, that in all other Judicial Proceedings and Decrees, it behoveth the Judge to have *plumbeos pedes* (*k*), Feet of Lead: ſo in this matter of Comparation, eſpecially it behoveth him to have *& plumbeos pedes, & Lynceos oculos*, not only Feet as heavy as lead, but Eyes alſo as clear and ſharp as *Lynceus*, of whom it is reported, that he was able to ſee through a Miſſtone (*m*); for if the Judge be either ſo

(*k*) Bald. in d.L. comparationes n.11. *qui dicit opoſſe veriorem.* & Sichard. ead. L.n.10. *qui refert eandem op. communiter teneri, & practicari, Quibus conveniunt* Ripa in L. admonendi ff.de jure jur.n.111. Menoch.d.caſ.114.n.29 Cravetta conſil. 216.n.18. (*m*) Zaſ.lib.2.ſing.reſponſ.c.25.in fin.Covar.pract.q. c.22. Zaſ.lib.2.ſing.

ſwift,

swift, that he run to this Comparation without observation of these Requisites above recited, doubtless the Comparation will be of little force (*n*); and so his great hast shall make but small speed; or if his Judgment be not very Sharp, and more Subtle than the Serpent, how orderly soever he proceed to work about the Examination of these Writings, yet happily he may be deceived by counterfeit Instruments (*o*); for it is a thing generally complained on in all Ages, namely the great Cousenage that hath been practised by Forgery, or making of Counterfeit and Adulterous Writings; Amongst others I remember *Zasius* (the most famous Lawyer that ever *Germany* bred) maketh mention of a certain Monk of the Monastery of St. *Udalrick* in the City *Augusta*, that was so passing skilful, that if he had looked upon any Writing, he would have imitated the same so lively, as it should seem rather to be the very original it self, than like unto it (*q*). I wish we had no greater store of false Forgeries than of mumbling Monks at this day in *England*, a thing rather to be wished than hoped, the more is the pity; for though the famous Forger of *Ripon* in *Yorkshire* be dead, whom I marvail Mr. *Green* hath not numbred amongst his Cony Catchers, yet I fear there be a great many Whelps of the old Dog left alive, that had rather bite than bark. And therefore since this matter is so subject to their Impostures, it standeth the Judge in hand to be so much the more circumspect, lest he himself be caught for a simple Cony.

(*n*) Acron. in Horatium.

(*o*) Zas. cons. 4. lib. 2. in subscrip. Sichard. in L. comparationes de fide Instr. n. 5. Paris. consil. 19. n. 35. vol. 3.

(*p*) Zas. lib. 2. sing. resp. c. 25. Gravat. in addic. ad praxin o-ctav. Vestrij lib. 6. c. 1. n. 26.

(*q*) Hyppol. in Rub. de prob. de prob. C. n. 317. Maschard. Tract. de probat. concl. 330. n. 3.

(*r*) Zas. lib. 2. sing. respons. c. 25. in fin.

SECT.

SECT. XIV.

Of Publick and Private Spousals.

1. FOurthly, Spousals be either Publick or Private (*a*); publick Spousals are they which are contracted before sufficient Witnesses, and wherein are observed all other Solemnities requisite by the Ecclesiastical Law (*b*): For so careful were the ancient Law-makers to avoid those mischiefs, which commonly attend upon *secret* and *clandestine* Contracts, that they would have the same Solemnities observed in contracting Spousals, which be requisite in contracting Matrimony (*c*); Which Solemnities what they are shall afterwards be declared (*d*): Private Spousals are they, at the Contracting whereof, are omitted some of those Solemnities aforesaid (*e*), but especially when as there be no *Witnesses present* at the Contract (*f*): In which Case these questions following are usually propounded.

(*a*) Reusner. de Sponsal. Lib. 1. q. 1. Panor. & Præpos. in c. cum Inhibitio. de clandestin. desponsat. Schneid. tract. de nup. fol. 22.

(*b*) c. nostrates. 30. q. 5. Reusner. de Sponsal. lib. 1. q. 1. n. 1.

(*c*) Panor. in c. cum inhibitio. de clandestin de Sponsal. extra. n. 6. Præpos. eod. c. n 5. Summa Rosella verb. Impedimentum. el. 1. vers. Quæritur.

(*d*) infra parte 2. §.

(*e*) d. c. nostrates & c. aliter. 30 q. 5. Reusner. lib. 1. de Sponsal. qu. 1. nu. 2. gloss. in c. 4. de cland. desponsatione. extra. vide Schneidwin. Tract. de nuptijs fol. 22. *ubi refert Sponsalia sex modis dici posse clandestina.* ex Hostiens. in Rub. de clandest. desponsat. extra.

(*f*) c. 1, 2, & 3. de clandestin. desponsat. extra. Schneidwin. ubi supra Melchior. Kling. Tract. de Matrimonio fol. 68. Jo. Frigeus Tract. de Sponsal. pag. 266.

2. First, whether such secret Contracts be good in Law, yea, or no? And it seemeth they are not good, by reason it is thus written in the Text of the Law, *Nullum pactum, nullam conventionem, nullum Contractum inter eos videri volumus subsequutum, qui lege contrahere prohibente, contrahunt* (*g*); We will that no part, no Covenant, no Contract, shall be thought to follow,

(*g*) L. non dubium C. de legib. c. nullum. 30. q. 5.

betwixt them which do contract, when as the Law doth forbid them to contract; But the Law doth forbid all Persons to make *Secret* Contracts of Spousals, or Matrimony (*h*); and that justly, considering the manifold discommodities depending thereupon, namely, for that hereby it cometh to pass oftentimes, that the Parties secretly contracting, are otherwise formally affianced, or so near in Blood that they cannot be Married; or being free from those impediments, yet do they alter their purposes, denying and breaking their promises, whence Perjuries, Adulteries, and Bastardies, with many more intollerable mischiefs do succeed (*i*); and therefore such secret Pacts, Covenants, and Contracts are worthily reputed, as if they had not been made at all (*k*). Again, this is a Common Conclusion, *Idem est in lege non esse & non apparere*, It is all one in Law not to be, and not to appear (*l*); Wherefore seeing secret Contracts cannot be proved, it is all one in effect, as if they were not (*m*).

(*h*) d. c. nullum & Titul. de clandestin. desponſ. extra. per totum.

(*i*) Schneidwin tract. de nuptijs fol. 23. Covar. tract. de Sponsal. secunda. parte c. 6. in princ. n. 7.

(*k*) d. c. nullum. 30. q. 5. arg. d. L. non dubium C. de legib.

(*l*) L. in lege ff. de contrahend. Emp. & ibi DD. lib. 2. consil. Matr. consil. ibidem. 2. n. 1.

(*m*) Reusner. de Sponsal. q. 1. n. 32, 33, &c. Socin. sen. cons. 119. vol. 3. vers. Secunda Conclusio.

3. Others are of another Opinion, holding the Contract for firm and indissoluble (*n*); for the Confirmation whereof, they alledge a very round Text, extant in the Body of the Law, the words are these, *Clandestina Conjugia contra leges quidem fiunt, Contracta tamen dissolvi non possunt* (*o*), Secret Marriages are done indeed against the Law, but being contracted, cannot be dissolved; Yielding this reason, that because these Solemnities are not of the Substance of Spousals, or of Matrimony, but consent only (*p*); for (as another Text saith), *Suffi-*

(*n*) Panor. in c. 1. de cland. desponſ. extra. n. 2. Dec. consil. 163. n. 4. Præpos. in Rub. de clandestin. desponſ. n. 2. Everard. cons. 10. Covar. tract. de Sponsal. secunda parte c. 6. n. 7. Hyero. Schurf. lib. 2. cons. Matr. consil. 24. n. 1, 2, 3, & 4.

(*o*) c. nec. illud. 30. q. 5. (*p*) Panor. in c. 1. de clandestin. desponſ. extra. n. 2.

cit

cit nudus Consensus ad constituenda Sponsalia (*q*), Naked Consent is sufficient to make Spousals; And therefore if bare Consent is sufficient, these Solemnities are not so necessary as without the which Spousals cannot consist (*r*), being no more than Accidents, the which (as the Logicians teach us) may be either present or absent, without the destruction of the principal Subject (*s*); So that it may be justly inferred, that the only want of Solemnity doth not hurt the Contract (*t*).

(*q*) L. sufficit de Sponsal. ff.
(*r*) Arg. c. 2. de clandestin. desponsat. extra. cum gloss. ibidem. gloss. in c. sufficiat. 27. q. 2. verb. Solus Panor. in c. Tuæ. de Sponsal. extra. n. 2. in fin. Hieron. Schurf. lib. 2. cons.

Matr. Consil. ibidem 24. n. 2, 3, 4. (*s*) Ideoque accidens omnium prædicabilum indignissimum dici solet Jo. Casus. Oxon. de accidente fol. 68. (*t*) *Clandestinitas sola non tutiat Matrimonium*, inquiunt Cardinal. & Præpos. in Rub. de Sponsal. extra. Panor. in c. 1. eod. Tit. n. 2. Dec. consil. 163. n. 4. Linwood. in c. humana. de clandestin. desponsat. lib. 4. provincial. Const. Cant. verb. clandestina. in fin.

4. To the Reasons whereupon the contrary Conclusion is collected, it is thus answered: First, that no Pact, no Covenant, no Contract, shall be thought to be made betwixt them, whom the Law doth prohibit to contract, &c. That's true, when the Act is simply forbidden, but when the Act is not simply forbidden, but only in respect of some quality, which is not of the Substance thereof; Then the Act done without that *Quality*, is not to be accompted for undone (*u*); now to contract Spousals is not simply forbidden, but in some respects only (*x*); And therefore being done without the observation of those unsubstantial Circumstances, is not to be reputed for undone.

(*u*) Bald. in d. L. non dubium. C. de legib. n. 15. alij aliter solvunt, ut Præpos. in Rub. de Desponsat. extra. & Antho. Gubert. Tract. de Matrimonio. fol. 163. nu. 122. Vide Peckium in c. quæ contra jus. de Reg. Jur. in. Sext. & Hyero. Schurff. lib. 2. consil. Matrimonial. fol. 134. n. 10, 11, 12. (*x*) Hiero. Schurff. lib. 2. consil. Matrimonial. consil. ibidem 24. n. 11.

5. As for the other Reason, That not to appear, and not to be, are both one in Law, that's true *Jure fori, non*

jure poli (y), Before Man, not before God; for the Church indeed doth not judge of secret and hidden things, whereof there is no appearance (z). But most true it is, that Almighty God being Καρδιογνώστης, before him bare Conscience alone is as a thousand Witnesses (a); Wherefore I do admonish thee, that hast in truth contracted secret Matrimony, that thou do not marry any other Person, for doubtless this thy pretended Marriage, how lawful soever it may seem in the eye of Man, who judgeth only according to the outward appearance, is nothing, but meer Adultery in the infallible sight of God's just Judgment, whose Justice rewards every Man according to his Works, and before whose Tribunal thou must at last appear to give an accompt of this thy foul Misdeed.

(y) Gloss. & DD. in c. 2. de cland. desponf. extra. & ibi Præpos. in fin. Melchior. Kling. Tract. de causis matrimonial. fol. 68, 69. Everard. consil. 11. Lindwood. in c. Humana. de clandestin. desponf. lib. 4. Provincial. Const. cant. verb. clandestin. in fin. Baptista Ferret. consil. 174. n. 2.

(z) c. consuluisse. 2. q. 5. c. si omnia. 6. q. 1. c. Tua nos. de Sponsal. extra. gloss. in c. 2. de cland. desponf. in princ. in Tractat. Schismat. col. 3. c. literas de restitut. Spol. extra.

(a) Bald.

6. But now admit thou art willing to marry, and the other Party is not only unwilling, but utterly denieth the intent or consent to any Marriage; Whether in this Case maist thou with safe Conscience marry elsewhere? It seemeth at the first view, That thou canst not marry so long as the other Party liveth, to whom thou didst so assuredly give thy faithful Promise of Matrimony, as appeareth by thine own Confession, making a full and strong proof against thy self: Nevertheless, the Case being rightly scann'd, I am of their Opinion which hold that thou maist with Safety, not of Law only, but of Conscience also, proceed to marry any other Person.

7. First, Seeing the other Party constantly denieth the intent and consent of Marriage, for his or her part, without which Consent, as well on the behalf of that other Party,

Party, as on thine own behalf, it is a clear Case, That no Matrimony can consist, neither in Law nor in Conscience, for the Consent must be mutual and reciprocal, as I have often confirmed. Is it possible for a Man to be a Husband without a Wife? Or a Woman to be a Wife without a Husband? Seeing (I say) the other Party so constantly denieth this necessary Consent, thou maist safely from thy Conscience act according to this constant denial, and perswading thy self that the same is true, then art thou at liberty to marry elsewhere, without any let in Law, or Scruple in Conscience.

8. This Case thus absolved, let us vary the Case a little. A Man and a Woman are first secretly, yet truly and before God, contracted in Matrimony either of them, mutually giving there, their full and perfect Consent to the other therein; afterwards the Man is publickly contracted to another Woman in Matrimony, the former Woman practiseth all good means, as well by Suit as otherwise, to recover him for her Husband, but prevaileth not, for want of sufficient proof; Whether may she with safe Conscience marry another Husband? Albeit this Question may seem to appertain to the determination of Divines, yet will I adventure to signifie mine own Opinion, having first resolved another Question preparatory thereunto; which Question is this.

9. A Man doth secretly (I mean without the presence of Witnesses) contract Spousals or Matrimony with one Woman, and afterwards publickly and before a sufficient number of Witnesses, doth make the like Contract with another Woman; after which second Contract the former Woman chargeth him, and he likewise *confesseth* that he was formerly contracted unto her, Whether in this Case, shall the former secret Contract, or the second publick Contract prevail (*b*)?

(*b*) De hac q. vide DD in c. a. de cland. desponſ. extra.

10. It

10. It ſeemeth, becauſe the ſame being (in truth) firſt made, this truth now appearing by the Confeſſion of both Parties, is to be preferred before the ſecond publick Contract (*c*), and that not only in *forò poli*, and before the Tribunal of the Infallible Judge, to whom all things (how ſecret ſoever) be all naked and open; but alſo in Courts (*d*) and Conſiſtories of mortal Men, whoſe Judgment is directed according to that which appeareth, and is proved (*e*). And as no Man can dye with two Teſtaments at once (*f*), ſo no Man can live with two Wives at once (*g*): Howbeit Teſtaments and Contracts be in this point, of a contrary Condition; for of Teſtaments the latter is the better, and maketh void the former (*h*); but of Contracts, the former is the better, and maketh void the latter (*i*): Wherefore, the Man having firſt given his Faith to one Woman, cannot afterwards give the ſame to another Woman (*k*). And ſo the former Contract, albeit at the firſt ſecret, yet afterwards publiſhed and made known, is to be preferred before the ſecond publick Contract (*l*).

(*c*) *Veritas opinioni præferenda, maxime in Spiritualibus.* c. veritate. 8. Diſtinct. Card. in Clem. 11. §. f. q. 5. de pœn. & remiſſ. Bald. in l. 2. C. de Ingen. L. pœn. §. mulier alias L. Imperatorçs. §. ultim. ff. probat. & ibi DD.

(*d*) Everard. conſil. 11. ult. vol. lib. 4. Tit. 11. n. 43.

(*e*) *Unde probatio dititur quaſi vehiculum, quo Judex fertur ad Summam.* Mantic. de conjectur.

(*f*) L. Jus noſtrum. ff. de Reg. Jur. L. Sancimus C. de teſta.

(*g*) L. eum qui duas C. de Adult. L. 2. C. de inceſt. nup.

(*h*) §. poſteriore Inſtit. Quib. mod. teſta. infirm.

(*i*) *Intellige, ſi utraque Sponſalia ſint de præſenti, vel utraque de futuro.* Henr. Boic. in c. 1. de Sponſ. duorum extra. ſecus. *Si Priora ſint de futuro, poſteriora verò de præſenti.* Boig. ibidem.

(*k*) Everard. d. conſil. 11. n. 3. in fin.

(*l*) Henr. Boic. in c. cum Inhibitio, de clandeſtin. deſponſ. extra. 1. Diſtinct. verſic. aut quæris de tertio. Ruckerus cujus conſil. extant. in lib. 2. conſil. matrim. & eſt conſil. ejus lib. 36. n. 6.

11. Others nevertheleſs (whoſe Opinion is generally received) are of this Judgment, That howſoever, before God, the ſecret Precontract, though it were never publiſhed, is to be preferred before the like ſubſequent Contract, how publick ſoever (*m*); yet before his Church it is otherwiſe (*n*); neither is the ſole Confeſſion of both

(*m*) Everard. conſil. 11. gloſſ. in c. 2. de clandeſtin. deſponſ. extra.

(*n*) Panor. in c. quod nobis. de clandeſtin. deſponſ. extra. n. 6.

Et omnes DD. ibidem. Schneidwin. Tract. de Nuptiis, fol. 24. Reuſner. de Cauſis matrimonial. lib. 1. q. 1. lib. 2. conſil. matrimonial. conſil. ibidem. 36. n. 12, 13, &c 14. Pariſ. conſil. 57. n. 40. vol. 4.

the

the Parties, pretending themselves to be Pre-contracted, in secret sort, betwixt themselves alone, to be credited in prejudice of a sufficiently testified Contract, and proved by Witnesses (*o*); because otherwise it were a very easie matter for such, as were truly contracted, under pretence of a Pre-contract, at their pleasures whensoever they were displeased either with other, to undo the undoubted Contract, by suborning one, of whom they had better liking, to affirm a former secret Contract (*p*): A mischievous Inconvenience in no wise to be tollerated (*q*).

(*o*) gloss. in c. Si quis Divinis. 30. q. 5. Ruckerus. Cujus consilium videre est lib. 2. Consil. matrimonial. fol. 189. quod velim videas. n. 12. 13. & 14. Covar. Tract. de Sponsal. prima parte, c. 4. nu. 5. Paris. consil. 57. vol. 4. n. 40. Panor. & alii in c. 2. de clandestin. desponsat. extra. lib. 1. consil. matr. consil. ibidem 19. n. 3. consil. matr. consil. ibidem 36. n. 13. eo qui cogn. consang. ux. extra.

(*p*) Schneidwin. Tract. de Nuptiis, fol. 24. lib. 2. consil.

(*q*) Schneid. & Rucker. ubi supra. DD. in c. super eo. de

12. As concerning the reason of the contrary Opinion, *viz.* That the truth is to be preferred when it appeareth (*r*). That's true, if it appear by lawful and sufficient proof (*s*); but the sole Confession of both the Parties, is not a lawful or sufficient proof, in prejudice of another Contract lawfully and sufficiently proved, by the testimony of Witnesses (*t*). Indeed if it were not in prejudice of another Contract, the bare Confession of the Parties would suffice (*u*): Or if this Confession of both the Parties were made before the second Contract was made, then also peradventure it might suffice against the second Contract (*x*), because at that time the

(*r*) c. veritate distinct. 8. L. pen. §. mulier. ff. de probat. in fin.

(*s*) Henr. Boic. in c. Cum Inhibitio. de cland. desponsat. extra. distinct. 1. in fin. lib. 2. consil. matrimonial. consil. ibidem 36. n. 12.

(*t*) gloss. in c. si quis divinis. 30. q. 5. lib. 1. consil. matrimonial. consil. ibidem 19. n. 3. & consil. 83. n. 20. Panor. & alii in c. 2. de clandestin. desponsat. extra. *quorum opinio procedit licet secundum matrim. non sit contractum in facie Ecclesiæ, sed coram duobus tantum testibus.* Præpositin d. c. 2. n. 4. & Socin. Sen. consil. 270. col. 2.

(*u*) Gloss. & Panor. in c. super eo. de eo. qui cogn. consang. ux. extra Dec. consil. 163. col. 1. Bald. consil. 48. vol. 4. Rom. Sing. 616. alias 620. incipien. *Tu audivisti. Immo parte absente probat contra confitentem ipsius confessio, de æquitate Canonicâ*, Mascard. de probat. concl. 1029. n. 4. & communiter DD. in c. si Cautio. de fide Instr. extra.

(*x*) Johan. de Canibus, inter consil. matrimonial. lib. 1. consil. ibidem 19. in fin. Jacob. de Zochis & alij in d. c. super eo. Covar. Tract. de Sponsal. prima parte, c. 4. n. 5.

Con-

Confession cannot be suspected of any Collusion (*y*): But the Confession being made after the time of the second Contract, which Contract is proved by two sufficient Witnesses, in this Case, not only the Confession of the Parties is not sufficient to prove a Pre-contract, but also if besides the Confession of the Parties, there were *one Witness* who did likewise depose of the same Pre-contract (*z*); yet were not the Testimony of this one Witness joyned with the Parties Confession, able to overthrow the second Contract, proved by two able Witnesses (*a*). Likewise the testimony of one Witness, together with a common *voice and fame* of a Pre-contract, is not able to overthrow the second Contract proved by two sufficient Witnesses (*b*); for this Conclusion is commonly received, That when the proof of the second Contract is more clear than of the former Contract, there the second Contract is to be preferred (*c*), saving in these Cases following, *viz.* When the second Contract is made depending the Suit, about the former Contract (*d*); for the Contract made depending the Suit loseth that Privledge, which otherwise it should enjoy (*e*): Or when the second Contract is made under this Condition, if there be no Pre-contract before going, or if the Pre-contract be frustrate and Void (*f*), or

(*y*) Arg. de c. super eo. Jo. de Canib. d. consil. 19. in. fin.

(*z*) *Regulariter autem unus testis de contractu, & alter testis de partis confessione plenè probant matrimonium.* lib. 1. Consil. matrimonial. consil. ibidem 16. n. 14. & consil. 51. n. 5.

(*a*) Socin. Sen. consil. 270. col. 2. versic. Ista Conclusio. &c. Jacob. Henric. in lib. 2. consil. matr. consil. ibidem 16. n. 5. Præpos. in c. 2. de clandestin. desponsat. extra. *quorum opinio procedit concurrente etiam famâ, cum isto teste & partium confessione, ut per* Bonacoss. Thesaur. com. op. verb. matrimonium, & per Socin. Præpos & Jacob. Henr. ubi supra. (*b*) Vincen. & post eum Canonistæ in c. 2. de cland. desponsat. contra Cardinal. in d. c. *communiter reprobatum*, ut per Panor. & Præpos. in d. c. 2. quibus accedat Corsetus singularis. 246. verb. Probatio. Dec. consil. 153. n. 11. Felin. in c. 1. ut Lite non contestat. col. 2. Socin. consil. 119. vol. 3. decis. Tholoss. q. 172. Bonacoss. Thesaur. com. op. verb. matrimonium. (*c*) Panor. in d. c. 2. de clandest. desponsat. extra. in fin. Hostiens. in Summa eod. Tit. §. verum clandestina matrimonia. Paris. consil. 53. vol. 4. Præpos in d. c. 2. n. 4. Corset. d. singul. 246. & Aufrer. in addic. ad Decis. capell. Tholoss. *ubi refert se judicâsse pro secundo matrimonio manifestè probato, contra precedens matrimonium, vel ex illo tantum capite quod testes de primo matrimonio non erant omni exceptione majores. Et quæ dicta sunt de clandestinis Nuptiis, habent quoque locum in clandestinis Sponsal.* de futuro. *Nimirum quod publica præferantur clandestinis.* Kling. Tract. de caus. matr. fol. 70. (*d*) Covar. Tract. de Sponsal. secunda parte. c. 6. n. 11. Dec. consil. 163. n. 11. Imol. consil. 125. (*e*) Arg. c. Tenor. de re Jud. extra. & DD. ibidem. Covar. ubi supra. Imol. d. consil. 125. (*f*) Covar. d. c. 6. n. 11. Andr. Barba. consil. 40. col. 2. vol. 3. *Quod si posterior contractus sit simplex, licet non fuerit publicatus in facie Ecclesiæ, tamen initus coram duobus testibus, tanquam certior & clarior, præfertur alteri, de quo extat unicus testis cum famâ & confessione partium.* Præpos. in d. c. 2. Soc. consil. 270. lib. 2. consil. matrim. fol. 112. n. 5.

when

when the former Contract comprehendeth Spouſals *de præſenti*, the other Spouſals *de futuro* (*g*); or when as over and beſides this one Witneſs and Fame, there be other Adjuments or Helpers, ſuch as may ſuffice to induce the Judge to give Sentence for the former Contract (*h*): In theſe Caſes the former Contract proved by one Witneſs with the Fame, *&c.* is preferred before the ſecond Contract proved by two intire Witneſſes.

(*g*) Boic. in c. 1. de Sponſ. duorum extra.

(*h*) Aretin. conſil. 82. col. 4. Covar. & Tract. de Sponſal. ſecunda parte c. 6. n. 11. in fin. Bald. conſil. 51. alias 48. vol. 4.

13. Another Queſtion incident to ſecret Contracts, is this, A Man and a Woman are firſt ſecretly, yet truly and before God contracted, either of them mutually giving their full and perfect Conſent thereunto; Afterwards the Man is publickly contracted to another Woman; The former Woman practiſeth all good means as well by Suit as otherwiſe, to recover him for her Huſband, but prevaileth not for want of ſufficient proof; In this Caſe whether may ſhe with ſafe Conſcience Marry another Husband? It ſeemeth that ſhe may (*i*), for having endeavoured to the utmoſt of her power, nor able to continue any longer; It were not only againſt Law, but againſt Reaſon and Equity, that ſhe ſhould be bound to an *impoſſibility* (*k*); And therefore of two Evils (whereof the one is inevitable) the leſs is to be choſen (*l*), that is to ſay, it is better for her to marry than to burn in the Fire of Luſt and Concupiſcence (*m*).

(*i*) Arg. c. 1. & c. nullum. 30. q. 5. Theod. Beza. tract. de divortijs fol. (lib. mei) 87. & 164. *Ubi docet quod clandeſtina Sponſalia, nempe quæ abſque conſenſu parentum contrahuntur ſunt ipſo Jure nulla.* (*k*) L. Impoſſibilis. de verb. ob. ff. c. Nemo de Reg. Jur. 6. & ibi Dyn. & Peckius. (*l*) L. Si Procurator. ff. de doli except. L. exigend. C. de procur. (*m*) Epiſt. 1. ad Cor. c. 7. verſ. 9.

14. Contrariwiſe it ſeemeth that ſhe may not (*n*); for he and ſhe being once very Husband and Wife before God (*o*), the Woman is in ſubjection to the Man, and is bound unto him while he liveth (*p*), nor is delivered, until the Man be Dead (*q*); So that if while the Man

(*n*) Ambroſ. in lib. de Patriarch. de quo in c. nec illud. & in c. ſeq. 30 q. 5. (*o*) d. c. nec illud. & c. Si quis eum c. fin. 30. q. 5, (*p*) Epiſt. Paul. ad Rom. c. 7. verſ. 2. (*q*) ibid.

liveth, she take another Husband, before God it is Adultery (*r*); only then, when her Husband is Dead, she is at liberty to marry with whom she will in the Lord, and not before (*s*); unless this be true that by reason of the Husbands Adultery, she may Marry another, (of which question we shall have better opportunity to discourse more at large in another place (*t*);) or unless in contracting Spousals, the consent of Parents be necessary, the which being awanting in the former Contract, the Spousals therefore may be broken without peril; (of which Question also I mean to deliver my Opinion hereafter) (*u*); or unless the former Contract contained Spousals *de Futuro*, and the second *de Præsenti*; for then also the former Spousals are dissolved (*x*), and the Party at liberty to marry elsewhere, both in Law and Conscience; and by the Opinion not of Lawyers only (*y*), but of Divines also (*z*). What other Questions or matter may seem to appertain to secret Contracts, shall be more fully handled in the Treatise of secret Marriages.

(*r*) Eod.c.verf.3.

(*s*) Epist.adCor. c.7. verf. 39.

(*t*) Infra parte tertia.§.

(*u*) Infra parte secunda.

(*x*) c. Si inter de Sponsal.extra.

(*y*) Canonistæ in c. Si inter. de Sponsal. extra. Legistæ in L. final. de donat. ante nup.C.

(*z*) Beza. Tract. de divor. pag. 6, & 7. Lombard. lib.4. dist.inc. 27,28.

SECT.

SECT. XV.

Of Contracting Spouſals by Signs.

1. IT is an old and a tough Controverſy, whether words be *neceſſary* in contracting Spouſals or Matrimony (*a*); Wherein divers do hold the affirmative (*b*), at leaſt as touching the Church, (which doth not otherwiſe determine of that which is conceived inwardly, but that which is expreſſed outwardly (*c*)); and for this affirmative Opinion, there is a ready Text, extant in the bowels of the Law, containing theſe words, *Matrimonium in veritate contrahitur, per legitimum Viri, & Mulieris conſenſum, Sed neceſſaria ſunt (quantùm ad Eccleſiam) verba Conſenſum exprimentia, &c.* (*d*) Matrimony in truth is contracted by lawful Conſent of Man and Woman, But words expreſſing Conſent be neceſſary, as touching the Church, *&c.* Others nevertheleſs hold the negative (*e*), by reaſon of another Text, which ſaith, *ſufficit ad Matrimonium ſolus illorum Conſenſus, de quorum Conjunctionibus agitur* (*f*) (*id eſt*) Their Conſent alone is ſufficient for Matrimony, of whoſe conjunction there is any ado; and it followeth in the ſame place, that he or ſhe which cannot ſpeak, may contract Matrimony; the Reaſon there yielded is this, *Quod verbis non poteſt, Signis valeat declarari* (*g*), That which can-

(*a*) Gloſſ. & DD. in c. Tuæ & c. Si inter de Sponſal. extra. Covar. tract. de Sponſal. ſecunda parte c. 4. in princ. Summa Silveſtrin. verb. matrim. §. 2. q. 7. & 8.

(*b*) Inno in d. c. Tuæ de Sponſ extra. part. Gloſſ. ibidem. Bar. in L. nuptias de Reg. Jur. ff. Lux. de penna in L. 1. C. de veteranis. lib. 12.

(*c*) c. conſuluiſſe. 2. q. 5. c. Is qui 32. q. 2. Innoc. ubi ſupra.

(*d*) c. Tuæ. de Sponſal. extra. Accedit etiam Textus in c. ſi inter. eod. Tit.

ponderando hæc verba, *Itaque unus alterum mutuo conſenſu verbis conſuetis expreſſo*, *&c.* (*e*) Hoſtienſ. in d. c. Tuæ. quem ſequuntur Anto. Card. & Panor. eod. loc. Boer. deciſ. 1. n. 18. Covar. Tract. de Sponſal. ſecunda. parte. c. 4. n. 1. Socin. Inn. conſil. 29. n. 3. vol. 3. (*f*) c. cum apud. de Sponſal. extra. *Cum igitur ſufficiat Conſenſus, verba non ſunt præciſè neceſſaria, quia illud Doctores ſufficere, quo poſito nihil aliud requiritur ad ſubſtantiam actus.* Angel. Clavaſ. verb. Matrimonium. el. 2. q. 4. (*g*) d. c. cum apud. *unde ſi mutus poſſit contrahere Matrimonium per ſigna, multo magis ille qui loqui valeat.* arg. D. Nutu. ff. de leg. 3.

not be expressed by words, may be declared by Signs. Seeing then sole Consent is sufficient; and seeing they which be Dumb and cannot speak, may lawfully contract Matrimony by Signs, which Marriage is lawful and available, not only before God, but also before his Church, it followeth that words are not so precisely *necessary*, as without the which Matrimony cannot be contracted; and this Conclusion is most commonly received of all, or the most later Writers (*b*).

(*b*) Hostiens. Ant. de Butr. Cardinal. & Panor. in c. Tuæ de Spons. extra. Socin. Jun. cons. 29. n. 3. vol. 2. Covar. Tract. de Sponsal. secunda parte c. 4. n. 1. Soarez. Thesaur. com. op. verb. Matrimonium n. 87. & Vivius eodem libro. & eod. verb. Cagnol. de Reg. Jur. ff. n. 5. *Sed præ cæteris doctissimè & elegantissimè* Nichol. Boer. consil. 45. *qui nihil intactum reliquit, quòd pro hujusce opinionis clypeo facere videatur, aliésque pro hac parte consuleun' diligentissimè signavit: Ad hunc igitur tanquam ad uberrimum fontem, si opus fuerit pro explendo tuæ Siti, recurrere velis, moneo.*

2. To the former Text, which saith (as concerning the Church) words be necessary, &c. Diverse answer diversly: Some, that by this word [*necessaria*], is meant [*utilia* (*i*)] profitable: Others that by the word [*verba*] is also understood [*Signa* (*k*) *Signs*]: Others that words be necessary indeed, yet not for the *form* or *essence* of Matrimony, but for a more certain or readier *proof* thereof (*l*); and others yield other Answers thereunto (*m*): But none of these Answers can satisfie the Authors of the first Opinion, who albeit, that they cannot but grant, that such Persons as cannot speak, may contract Spousals or Matrimony by Signs, expressing their Consents (*n*); yet will they not at any hand yield that such as *can speak* may contract Matrimony or Spousals by Signs only (*o*); And for Confirmation thereof, they

(*i*) Cardinal. Zabarel. in c. Tuæ de Sponsal. extra. (*k*) Prier. verb. Matrimonium. el. 2. q. 7. Covar. Tract. de Sponsal. secunda parte c. 4. n. 1. *Intellige tamen, Si modo signa sint Equipollentia sive Consensum exprimentia.* (*l*) Imol. in rep. de c. Tuæ. col. 7. Panor. eod c. in fin. Boer. consil. 40. n. 25. Præpos. in c. Si Rector. distinct. 43. quem videas. (*m*) Panor. & alij in c. Tuæ in fin. *Dicentesque hic non statuitur jus novum, sed respondetur à consulto Q. propositæ, consultus enim qualiter, num verba requirantur ad Matrimonium? respondet, Quod solus Consensus requiritur, assignans rationem, nempe, quòd, mutus recte contrahit Matrimonium, Ergo verba non sunt necessaria; nec obstat quod Ecclesia non potest certificari aliter quam per verba, Quia Immò potest Certificari tam facile, quam verbis, Inquit.* Præpos. in d c. Si Rector. distinc. 43. (*n*) c. Cum apud. de Sponsal. extra. (*o*) Debile refugium: Nam si mutus potest contrahere matrim. *multo magis ille qui loqui potest* Arg Inutu de leg. 3. ff.

do

do accumulate many Reaſons (*p*), which becauſe they be more tedious than forceable, I willingly omit, Replying with this only Argument, *viz.* If words be of the *eſſence* or ſubſtantial Form of Matrimony, Then cannot ſuch, as cannot ſpeak, contract Matrimony (*q*): But Dumb Perſons may (even by their own Confeſſion), and therefore are not words of the *eſſence* of Matrimony (*r*).

(*p*) Vide Præpoſ. in d.c. Tuæ. ubi producit 16 argumenta.
(*q*) Covar. Tract. de Sponſal. ſecunda parte c. 4. in princ.
(*r*) Gloſſ. & Inno. in d. c. Tuæ & d. c. cum apud. de Sponſ. extra. (*s*) Covar. ubi ſupra Nichol. Boer. conſil. 40. n. 24.

3. There is yet a third Opinion, defended by divers, who labouring ſtudiouſly to reconcile the two former Opinions, have deviſed this diſtinction, (*viz.*) That in caſe any treatiſe of Spouſals or Matrimony did go before, then Signs alone without words be ſufficient: But if there be no ſuch precedent treatiſe, then ſole Signs are not ſufficient (*t*). But this third Opinion is not altogether ſound (*u*); for though the former part thereof be true, that is to ſay, that Signs be ſufficient, where there is a treatiſe precedent, yet is not the ſecond part able to withſtand the Canon Shot, I mean the Reaſons of the Canon, whereby the firſt Opinion is overthrown, but muſt needs alſo fall and be battered with the ſame Bullet (*x*). Indeed it is true, that if the one Party expreſs his or her Conſent by words, the other by Signs, this Contract is of no leſs force, than if they had both uttered their Conſents by the ſame words (*y*): As for example, the Man ſaith to the Woman [*I do promiſe that I will Marry thee, and if thou wilt Marry me, then kiſs me or give me thy hand*], or thus, [The Man ſaith, *I take thee for my Wife, deſiring if thou accept me for thy*.

(*t*) Jo. And. in c. Tuæ de Sponſal. extra. Archid. in c. ſi Rector. diſtinct. 43. in fin. Henr. Boic. in d. c. Tuæ. (*u*) Panor. in c. Tuæ de Sponſal. extra n. 2. Boer. conſil. 40. n. 18. cum Seqq.
(*x*) *Nempe quia verba non ſunt de formâ eſſentiali Matrimonij, idcirco nec opus eſt, ut præcedant verba, ſi modo aliter per ſigna ecn-*

ſtare poſſit de mutuo contrahentium Conſenſu. (*y*) Henr. Boic. in c. Tuæ de Sponſ. extra. col. 2. Clavaſ. in Summa Angel. verb. Matrimonium el. 2. q. 4. in fin. lib. 2. Conſil. Matr. conſil. 34. n. 5. Menoch. Tract. de Præſump. lib. 3. præſ. 2. n. 2. Prier. verb. Matr. el. 2. q. 8.

thy Husband, to receive this Ring, or to pledge me in a Cup of Wine; In the former of which Caſes the Woman kiſſing or giving her Hand accordingly, Spouſals are Contracted; And in the Second Caſe receiving the Ring or pledging him, Matrimony is as ſufficiently contracted, as if ſhe had expreſſed her Conſent, by the ſame words, or others of the like importance (z): Likewiſe albeit neither of the Parties expreſs any words at all, but ſome *third* perſon recite the words of the Contract, willing them if they be therewith content, to joyn their hands together, or to embrace each other; the Parties ſo doing, the Contract is of like Efficacy, as if they themſelves had mutually expreſſed the words before recited by that third Perſon (*a*).

(z) Boic. Clavaſ. Prier. & Menoch. ubi ſupra Lapus Alleg. 57. d. conſil. 34. n. 5. lib. 2. conſil. matr.

(*a*) Panor. in c. 1. de Matrimonio contrah. interd. Eccleſiæ. n. 2. & ibi Præpoſ. Boic. in d. c. Tuæ de Sponſ. extra. Clavaſ. verb. Matr. el. 2. q. 4. & 5. Summa Hoſtienſ. in Rub. de Matrimonijs. §. qualiter paulò poſt princ. facit. Imol. in c. tenor. de Re. Jud. extra.

Nevertheleſs this is not all, for not only then when the one Party uſeth words, and the other Signs; or when a third Perſon uttering the words, both the Parties uſe Signs of Conſent, is the Contract good, according to the former branch of the aforeſaid diſtinction: But even there alſo, where no words at all be uttered, neither by the Parties, nor by any third Perſon, may Spouſals or Matrimony be contracted by Signs only, (ſo that the ſame be Significant) contrary to the ſecond Member of the ſame diſtinction, becauſe it is a common Rule of Law, *Ex Equipollentibus utrum fiat nihil intereſt* (*b*), Of things equally forceable, it skilleth not whether be done; Which Concluſion is eſpecially true in theſe Caſes, where a preciſe and eſſential form is not preſcribed (*c*), as in this, for if words were preſ-

(*b*) L. fidei commiſſa. §. Si Cui. de leg. 3. ff. & Bar. in Eund. §.

(*c*) Gloſſ. in clem. 1. in verb. tertio. de vita & hon. Clericorum Bar. in L. non ſunt liberi. ff. de Stat. hom. Tiraquel. de retract. Ligniagier. §. 1. Gloſſ. xx1. n. 11.

ſcribed

cribed for ſuch a form, then could not ſuch as cannot ſpeak contract Matrimony, or Spouſals (*d*), as is aforeſaid; Which thing becauſe they may undoubtedly do (*e*), It followeth that deeds are equivalent to words (*f*), ſo that the ſame be Significant, expreſſing the mutual Conſent of either Party (*g*).

(*d*) Covar. tract. de Sponſal. ſecunda parte. c. 4. in princ. Boer. conſil. 40. n. 27. Summa Angel. verb. Matrimonium. el. 2. q. 4.

(*e*) c. apud. Sedem de Sponſal. extra. (*f*) Clavaſ. in Summa Angel. verb. Matrimonium. el. 2. q. 4. Hoſtienſ. in c. Tuæ de Sponſal. extra. (*g*) Covar. Tract. de Sponſal. ſecunda parte. c. 4. in princ. Silveſter. Prier. verb. Matrimonium. el. 2. q. 7, & 8. Præpoſ. in c. Si Rector. diſtinc. 43.

5. By what kind of *words* Spouſals or Matrimony may be Contracted, is elſewhere declared at full (*h*); Now then it remaineth, that we ſpeak of ſuch Signs, whereby Spouſals or Matrimony is contracted; And foraſmuch as *Subarration*, that is the giving and receiving of a *Ring*, is a Sign of all others, moſt uſual in Spouſals and Matrimonial Contracts (*i*), I think it requiſite to ſpeak of it, before all other Signs; the rather becauſe the Writers upon this Sign have diligently deſcribed unto us, what Perſons did firſt deviſe the ſame, and to what end; and what was the matter, and what the form thereof, on which Finger it ought to be worn, and what is the Signification of each of thoſe Circumſtances, with divers other Obſervations which I will briefly run over.

(*h*) Supra. ead. parte. Paragraphis. 10, & 11.

(*i*) DD. in L. ultim. de Deſponſ. impub. extra.

6. The firſt Inventer of the Ring (as is reported) (*k*), was one *Prometheus*; The Workman which made it was *Tubal-Cain* (*l*), of whom there is mention in the fourth of *Geneſis*, that he wrought cunningly in every Craft of Braſs and Iron (*m*): And *Tubal-Cain* by the Counſel of our firſt Parent *Adam* (as my Author telleth me) (*n*), gave it unto his Son to this end, that therewith he ſhould eſpouſe a Wife, like as *Abraham* delivered unto his Servant Bracelets and Ear-Rings of Gold, which

(*k*) Alberic. de Roſa. in ſuo Dictionar. in verb. *Annulus*. Corſetus *in ſuo Repertorio, in Lectura* Panor. eod. verb. Annulus.

(*l*) ibidem.

(*m*) verſ. 22.

(*n*) Alberic. & Corſetus ubi ſupra.

which he gave to *Rebecca*, when he chose her to be *Isaacks* Wife, as we may read in the same Book of *Genesis* (*o*). But the first Ring was not of Gold, but of Iron, adorned with an Adamant (*p*), the Metal hard and durable, signifying the continuance and perpetuity of the Contract (*q*); the vertuous Adamant drawing the Iron unto it, signifying the perfect unity and indissoluble Conjunction of their minds, in true and faithful love (*r*); Howbeit, it skilleth not at this day, what Metal the Ring be; The form of the Ring being circular, that is, round, and without end, importeth thus much, that their mutual love and hearty affection should roundly flow from the one to the other, as in a Circle, and that continually, and for ever (*s*); The Finger on which this Ring is to be worn is the fourth Finger of the left hand (*t*), next unto the little Finger; because by the received Opinion of the Learned and Experienced in Ripping up, and anatomizing Mens Bodies (*u*), there is a Vein of Blood which passeth from that fourth Finger unto the Heart, called *Vena amoris*, Loves Vein (*x*). And so the wearing of the Ring on that Finger signifieth, that the love should not be vain or fained, but that as they did give their Hands each to other, so likewise they should give their Hearts also, whereunto that Vein is extended (*y*). Furthermore I do observe, that in former Ages it was not tolerated to single or unmarried Persons to wear Rings, unless they were Judges, Doctors, or Senators, or such like honourable Persons (*z*): So that being destitute of such Dignity, it was a note of Vanity, Lasciviousness, and Pride for them to presume to wear a Ring (*a*), whereby we may collect how great y

(*o*) c. 24. versic. 22.

(*p*) Nevizanus in Silva nuptial. lib. 3. in princ. n. 13. Alberic. & Corsetus ubi supra, *Ille in Dictionario, hic in Repertorio, uterque in verb. Annulus*, Alex. ab. Alex. de die genial. lib. 2. c. 19. pag. 229.

(*q*) Corsetus d. verb. Annulus.

(*r*) *unde antiquum Carmen, Ut ferrum Magnes, sic ad sese trahit Agnes.*

(*s*) c. fœminæ. 30. q. 5. Anto. Gubertus. de Sponsal. fol. 30. n. 14. Nevizanus d. lib. 3. n. 13.

(*t*) d. c. fœminæ. Nevizanus & Gubertus ubi supra. Covar. tract. de Sponsal. secunda parte. c. 4. in princ. n. ibidem 3.

(*u*) Appion. in libris Ægiptiacis. Aulus Gellius lib. & c. 10. Polidor. Virgil. de Invent. lib. 2. c. 21 Plin. lib. 33. c. 1.

(*x*) c. fœminæ 30. q. 5. in fin. Alex. de die genial. lib. 2. c. 19. fol. 229. Kling. de Causis Matrimonial. fol. 70. Covar. Tract. de Sponsal. 2. parte. c 4. n. 7.

(*y*) d. c. fœminæ. cum gloss. ibidem Kling. & Nevizanus. ubi supra. Præpos. in c ultim. de desponsat. impub. n. 4.

(*z*) Alex. ab. Alex. de die genial. lib. 2. c. 19. DD. in c. pen. de vitâ & hon. cler. extra.

(*a*) Hostiens. & alij in d. c. pen. Lindewood in c. exterior de vita & hon. cler. lib. 3. provinc. const. Cant.

they

they did honour and reverence the Sacred Estate of Wedlock in times past, in permitting the Parties affianced to be adorned with the honourable Ornament of the Ring: As also the Vanity, Lasciviousness, and intollerable Pride of these our days, wherein every skipping Jack, and every flirting Jill, must not only be ring'd (forsooth) very daintily, but must have some special Jewel or Favour besides, as though they were descended of some noble House or Parentage, when as all their Houses and whole Patrimony is not worth the Ninth part of a Noble; or else, as if they were betrothed or assured in the holy Band of Wedlock, when as indeed, there is no manner of Contract betwixt them, unless peradventure it be such a Contract as *Judah* made with *Thamar*, that was, that he should lye with her, which bargain he concluded by delivering her a Ring, and afterwards performed the same by committing Filthiness with her, and begetting her with Child (*b*). (*b*) Genes. 38.

7. But let these things pass: Come we to the other Observations, and consider, Whether this *Subarration* be a sufficient sign or proof of Matrimony or Spousals? Wherein we are first of all to regard, Whether any words of Matrimony or Spousals were uttered at the delivery of the Ring, yea or no? If any words were uttered, the delivery and acceptance of the Ring is no more but a Confirmation of such a Contract as those words do import (*c*); that is to say, if the words did import Matrimony, the Ring confirmeth Matrimony, and if the words did import Spousals only, the Ring betokeneth no more but bare Spousals (*d*); and that not only when the Ring is delivered at the same time of speaking the words, but at any time after (*e*); and if it be doubtful, whether the (*c*) Panor. in c. ultim. de desponsi. impub. extra. n. 7. & ibi Præpos. n. 4. Lapus allegat. 57. Menoch. de præsump. lib. 3. præsump. 2. n. 7.

(*d*) Panor. & Præpos. ubi supra. Hostiens. in Tit. de Sponsal. §. quot sunt species. August. Beronus q. 6. n. 5. Menoch. ubi supra. (*e*) Covar. Tract. de Sponsal. prima parte, c. 4. §. 2. n. 2. Innoc. & communiter alii in c. ultim. de desponsi. impub. contra Præpos. ibidem.

words import Matrimony or Spouſals, it is to be judged Matrimony (*f*): If alſo no words were uttered at or before the delivery or acceptance of the Ring, then we are to reſpect whether it were delivered in ſport, or in earneſt? If in jeaſt, it doth not betoken either Matrimony or Spouſals (*g*): If in earneſt, then the manner of delivery and acceptance thereof, is to be regarded; for if it were not delivered in ſolemn manner (as if he did not put it on her fourth Finger, but gave it her otherwiſe into her hands) it doth not ſignifie Matrimony (*h*), no more than when a Man ſendeth a Ring to a Woman by a Meſſenger, which is underſtood to be a Gift or Token of good will, and not a ſign of Matrimony or Spouſals (*i*). And albeit by the Opinion of ſome it may ſeem, that the Ring being delivered by the Party himſelf into the Womans hand, without putting the ſame on her Finger, Spouſals are thereby preſumed to be contracted betwixt them (*k*); yet dare not I deliver this Concluſion for current, as well becauſe in this Caſe, it ſeemeth rather a Gift or an Argument only of friendly good will, than an earneſt penny of Spouſals (*l*): As alſo, for that by this means, as by a Bait, many ſimple Maids might eaſily be hooked, e're they were adviſed, and ſo contracted before they conſented; a matter no leſs unreaſonable than unlawful (*m*).

(*f*) Menoch. de præſump. lib. 3. præſump. 2. n. 12. Cæpol. lib. 1. Conſil. civil. n. 14. Berous q. 6. n. 6. circa medium. Præpoſ. in c. ultim. de deſponſ. impub. n. 4.

(*g*) Henr. Boic. & Card. in c. ultim. de deſponſ. impub. extra c. illud. 15. q. 1. L. obligationum ſubſtantia. §. 1. ad fin. ff. *In dubio tamen non cenſetur quis jocoſè agere.* Præpoſ. in d. c. ultim. in fin.

(*h*) Panor. in c. Illud de præſump. n. 12. extra. Præpoſ. in c. ultim. de deſponſ. impub. extra. Covar. Tract. de Sponſal. ſecunda parte. c. 4. n. 3. in princ. Maſchard. de probat. concluſ. 1023. in fin. Berous q. 60 in fin. (*i*) Pariſ. Conſil. 55. n. 44. & conſil. 60. n. 50. vol. 4. Zaſ. conſ. 4. n. 31. vol. 2. (*k*) Menoch. de præſum p. lib. 3. præſ. 2. n. 10. Innoc. in c. Tuæ. de Sponſ. extra. Lucas de penna. in L. 1. c. ſi Libertas. L. 10. Quibus accedere videtur Præpoſ. in c. ultim. de deſponſ. impub. n. 4. & Galea Malvet. in conſil. matrimonial. conſ. ibidem 83. n. 21. (*l*) Pariſ. conſ. 55. n. 44. & conſil. 6. n. 50. Zaſ. conſil. 4. n. 31. vol. 2. Anto. Gubert. Tract. de Sponſal. fol. 29. in princ. Panor. in c. Illud. de præſump. n. 12. extra. Præpoſ. in c. ultim. de deſponſ. impub. extra. in fin. Berous. q. 6. in fin. (*m*) c. cum locum de Sponſal. extra. L. nuptias. de Reg. Jur. ff.

8. If the Ring be delivered in ſolemn Form, and put on the Womans fourth Finger, by the Party himſelf, and ſhe willingly

willingly, not only accept the same, but wear it accordingly; In this Case, by the Opinion of sundry Ancient and Reverend Writers, it is to be presumed for Matrimony (*n*); whose Opinion the rather may seem to be received, because by the general Custom of this Realm, and by the Form prescribed in the Book of Common Prayer, the Man is to give unto the Woman a Ring, and to put it on upon her said Finger at the time of their Marriage (*o*): For in case there were not any such Custom proved, yet by reason of the said solemn *Subarration*, Matrimony is presumed to be contracted betwixt them (*p*), (if this former Opinion be true) much more than when as the Custom of the Country is answerable thereunto (*q*); howbeit when there is not any such Custom, then I fear the former Opinion is scarce sound (unless some *Speech* or *Treatise* of Matrimony had gone before) not only because it is encountred by common Opinion (*r*), but also for that certain of the chief of them, which did defend the former Opinion, do afterwards upon better advisement seem to shrink from it, and cleave to the contrary (*s*): And therefore, whereas I have alledged that the Solemnity of the Ring is usually observed within this Realm at Marriages, forasmuch, as that is true indeed, when as the Marriage is celebrated in the face of the Church, according to the Book of Common Prayer, but not at the contracting of Spousals, albeit *de præsenti*, for ought I can learn: Therefore the former Opinion is not the rather to be received by that Allegation,

(*n*) Anto. de Butr. in c. ultim. de desponſ. impub. & ibi Præpoſ. num. 4. & Panor. in c. Illud de præſump. extra. n. 12. quem Felinus cod. c. ſequutus refert quod Panor. perfectè loquitur Aretin conſil. 13.

(*o*) Lib. publ. orat. in Eccleſiâ Angl. ubi de formâ Solemnizationis Matrimonij.

(*p*) Panor. in d. c. illud. n. 12. Præpoſ. in d. c. ultim. de deſponſ. impub. n. 4. & Anto. de Butr. ibidem. Aretin. conſil.

(*q*) Menoch. de præſump. lib. 3. præſump. 2. n. 9. in fin. Covar. Tract. de Sponſal. ſecunda parte, c. 4. in princ. n. 3. in fin.

Panor. in c. ultim. de desponſ. impub. extra. Pariſ. conſil. 55. vol. 4. n. 43. Zaſ. conſil. 4. vol. 2. n. 31. (*r*) Cardinal. in c. ultim. de desponſ. Imp. extra. Lapus Alleg. 57. Zaſ. conſ. 4. n. 31. vol. 2. Maſ. hardus Tract. de probat. concluſ. 1025. n. 2. Covar. Tract. de Sponſal. ſecunda parte c. 4. n. 3. Pariſ. conſil. 55. vol. 4. n. 43. Menoch. de præſump. lib. 3. præſ. 2. n. 9. (*s*) Panor. *qui* (in c. illud. d. præſump.) *Scriptum reliquit, quod non probatâ conſuetudine, Annulo per virum poſito in mulieris digito, præſumitur matrimonium; At poſtea* (viz. in c. ultim. de desponſ. impub.) *ſcripſit quod ſi nec verba interceſſerunt, nec apparet de conſuetudine, non judicatur pro matrimonio ex immiſſione Annuli; Idem ferè dicend' de* Præpoſito. in d. c. ultim.

unless the Custom be otherwise proved, which being proved accordingly, then I esteem it a Case free from all dangerous Contradiction, that by the Solemn delivery and acceptance of the Ring, in form aforesaid, the Parties are thereby presumed to have mutually consented to be Man and Wife, and so to have contracted Matrimony, albeit they used not any words, nor had any former Treatise sounding of Marriage (*t*). Thus much of *Subarration*, the first and principal sign of Matrimony; of the other signs, namely, of *Traduction*, of *Cohabitation*, and of *Entreating* each other as Man and Wife, &c. then shall we speak more fully when we entreat by what means Matrimony may be proved.

(*t*) Panor. in c. ultim. de desponf. impub. extra. n. 7. verf. *aut conſtat de conſuetudine*, &c. Covar. Tract. de Sponſal. ſecunda parte c. 4. n. 3. *ibi, vel quando eſt conſuetudine inductum.* Cardinal. in d.c. ultim. q. 1. ibi. Sed de conſuetudine Pariſ. conſil. 55. n. 43. vol. 4. Menoch. de præſump. lib. 3. præſ. 2. n. 6. Zaſ. conſil. 4. n. 31. vol. 2.

SECT.

SECT. XVI.

Of Spouſals confirmed by Oath.

1. SIxthly, Spouſals be ſometimes contracted without an *Oath*, and ſometimes they are contracted with Confirmation of an Oath (*a*); The former of them are called unſworn Spouſals, of which kind are all thoſe whereof hitherto we have diſcourſed; The other be termed [*jurata Sponſalia* (*b*) *Sworn Spouſals*], concerning the which I find divers Queſtions handled.

(*a*) Summa Hoſtienſ. Tit. de Sponſ. §. quot ſunt. Melchior. Kling. Tract. de Cauſ. Matrimonial. fol. 2. c. 2. & c. requiſivit de Sponſal. extra. Kling. de Cauſis Matrimonial. fol. 2.

(*b*) DD. in c. 2. & c. requiſivit de Sponſal. extra.

2. Firſt, whether theſe Spouſals may be diſſolved by the mutual Conſent of both the Parties, notwithſtanding their *Oaths*: Wherein, to be brief, It is flatly reſolved that they may (*c*); So that if a Man and a Woman do ſwear that they will Marry each other, yet is it in their power, by mutual Conſent to releaſe the Oath, and to diſſolve this Contract (*d*).

(*c*) c. præterea. §. Si autem de Sponſal. extra.

(*d*) Pan. Præpoſ. & DD. in d. c. præterea. Covar. tract. de Sponſal. 1. parte c. 5. in princ. Kling. tract. de cauſ. Matrimonial. fol. 2.

3. Againſt this deciſion it is ordinarily objected, That albeit the Parties have Authority peradventure, to diſſolve the Contract, being no more but Spouſals *de futuro* (*e*); Yet it is not in their Power or Authority to violate their *Oaths*, no more than it is within the Compaſs of their Commiſſion to Sin, and to take the name

(*e*) L. nihil tam naturale. de Reg. Jur. ff. d. c. præterea de Sponſal. extra.

name of the Lord our God in vain (*f*): And therefore they are by all means and ways to be induced to the Observation of their Oath (*g*).

4. To this Objection it is diversly answered; some do think that the Parties do sin herein (*h*); but yet, lest a greater mischief should follow (*i*), and lest their Sin should more and more encrease, and still grow greater by dayly disagreement, in case they were compelled to marry against their Wills; they are tollerated to depart (*k*): Others say that the Parties do not Sin in this Case (*l*); But that as an unlawful Oath may lawfully be broken (*m*); So that Oath, which is made for another Mans benefit, being willingly by him remitted, may thereupon be unperformed (*n*), without violation, aswell of Gods Law, as of Mans Law: As for Example, a Man promiseth and confirmeth it with an Oath, to pay unto thee *x l.* at *Easter* next, before which day thou dost forgive him the Debt; In this case, it is concluded without Contradiction, that he may without breach of Law, or touch of Conscience, not pay the *x l.* (*o*). And so they do not distinguish betwixt lawful and unlawful Oaths; but they make a difference betwixt lawful Oaths, For of these say they, some are made for *Gods Cause* (*p*); as for the advancement of Religion (*q*), or amendment of Mans Life (*r*); and some are made for Mans Cause (*s*), as in the former Example; In the one Almighty God is said to be a *Party*, in the other a *Witness* (*t*); Now, not to observe that Oath wherein the

(*f*) Arg. c. vinc. 32. q. ultima. (*g*) c. 2. de Sponsal. extra. (*h*) *hæc est opinio vulgi* Inquit Panor. ind. c. præterea n. 5. At qui eand. op. tenuit Hugo ut refert. Felin. eod c. n. 16. (*i*) d. c. præterea. *ibi ne forte deterius inde contingat, &c.* (*k*) *Unde existimarunt Quidam, dissolvi posse quidem Sponsalia jurata dissensu mutuo, non tamen ex ipsa dispositione Juris communis, sed ex quadam dispositione comparativâ, quasi sine peccato id fieri non potuit, sed tollerante Ecclesia ad evitand. majus malum, quæ tamen opinio, magis communiter reprobatur. Quorsum enim inducta fuisset similitudo dissolvendæ Societatis jurat. æ, Si non mero Jure remittatur Juramentum,* vide Panor. & Præpos. in d. c. præterea. (*l*) Henr. Boic. Panor. Præpos. & alij, post Innocent. in d. c. præterea. de Sponsal. (*m*) c. 1. cum sequen. 22. q. 4. c. non est obligatorium. de Reg. Jur. 6. c. Si vero de Jure jur. extra. (*n*) Panor. post. Inno. in d. c. præterea. n. 6. & Præpos. post. Jo. Andr. & alios in d. c. n. 7. & Felin. n. 13. & n. 33. Covar. tract. de Sponsal. prima parte. c. 5. in princ. ibi, ac si homo, &c. (*o*) Melchior. Kling. Tract. de Causis Matrimonial. fol. 2. in fin. & fol. 3. in princ. Henr. Boic in c. 1. c. præterea. de Sponsi extra. col. 1. in fin. versic. *aut non tenentur, &c.* Præpos. eod. in c. n. 5. (*p*) Henr. Boic. Panor. & Præpos. in d. c. præterea. de Sponsi extra. (*q*) *veluti Ecclesiam edificare, quasdam orationes dicere, &c.* (*r*) *Ut Adulteram abjuraret.* c. cum haberet de eo. c. dux. in matr. (*s*) DD. in d. c. præterea (*t*) ibidem.

Almighty

Almighty is a Party, it is plainly confessed by each Party to be a Sin (*u*): And therefore it is generally holden, that if a Man in respect of piety and Godly Devotion, swear that he will Marry such a *poor* Woman, and so contract Spousals with her, he cannot afterwards dissolve this Contract, though she would also consent thereunto (*x*): But not to perform the Oath whereunto God is a Witness only, when it is remitted by the Party, in whose only favour and sole benefit it was made, is no Sin, say they (*y*); and so when a Man and a Woman, not of Religion, but of affection, do swear, that they will marry together, the Oath being mutually remitted, the Contract may very well be not performed (*z*): Marry, whether this be good Divinity or not, I know not; For there be divers Cases delivered in Law wherein this Rule [*Jusjurandum serva*] may be broken, for which there is but little Warrant out of Gods Word; And therefore I refer this Question to the determination of the Godly and Learned Divines: But howsoever the Case may seem to stand clear in respect of the Laws, either Humane or Divine, forasmuch as it needs must be scandalous to the Church and Congregation, that a Christian Man, and a Christian Woman, having sworn to marry together, should not perform their Vows in so serious a Cause, and so Godly an Action (*a*), the Parties are by all means to be urged to the performance of this their Oath and promise (*b*); But if they will not be admonished, but do obstinately resist (*c*), then indeed, lest a worse thing should betide them, by reason of their mutual hatred, the Law doth permit them to depart, and dissolve the Contract (*d*).

(*u*) DD. ubi supra. c. vinc. 32. q. ult. c. quod Deo. 33. q. 5.

(*x*) Præpos. in d. c. præterea. n. 8. & Panor. ibidem in fin.

(*y*) Henr. Boic. in d. c. & ibi Panor. Anto præpos. And. & alij.

(*z*) DD. in d. c. præterea.

(*a*) Vide Gloss. final. in c. præterea. de Sponsal. extra.

(*b*) c. ex literis. el. 2. de Sponsal. extra.

(*c*) d. c. præterea, §. Si autem.

(*d*) d. c. præterea in fin.

5. But what if the one of the Parties contracted in manner aforesaid be willing, and the other unwilling, whether doth the single dissent of the one Party dissolve the Contract, or whether is the dissenting Party to be compelled

compelled to marry the other willing Party? To the former part of the queſtion, it is generally concluded by all Interpreters, as well of the Civil, as of the Canon Law; That it is not in the power of either Party alone, without the Conſent of the other to renounce or diſſolve the Spouſals confirmed with an Oath (*e*): Indeed if the Spouſals were not contracted with confirmation of an Oath, by the Civil Law, either Party might renounce ſuch unſworn Spouſals; and afterwards marry elſewhere, without any danger or fear of puniſhment *f*: Becauſe Spouſals are not Matrimony, but a preamble or preparation thereunto (*g*); and the Civilians do think that the Canon Law is not contrary to the Civil Law in this point (*h*); howbeit the Canoniſts for the moſt part are of another Opinion (*i*), becauſe by their Law, *Ex nudo pacto oritur Actio* (*k*); And therefore they conclude that the one eſpouſed Party, cannot renounce the Spouſals or diſſolve the Contract, albeit unſworn (*l*), without the Conſent of the other (*m*); Indeed this is a clear Caſe, even by the Canon Law, that if the one eſpouſed Party do (as they term it) *de facto* contract perfect Matrimony with ſome other Perſon, the ſecond Contract prevaileth, albeit, the Spouſals had been confirmed with an Oath (*n*), otherwiſe not: For the ſecond part of the queſtion, at leaſt, without juſt and urgent Cauſe (*o*), whether the unwilling Party may be compelled to marry the other, willing according to their mutual promiſe, confirmed by Oath; There be two ſeveral Texts, which at the firſt ſight ſeem contrary the one to the other, The former affirming that the un-

(*e*) Legiſtæ in l. 1. C. de Sponſal. Canoniſtæ in c. requiſivit de Sponſal. extra.

(*f*) L. 1. de Sponſal. & Arris. C. & Sichardus ibidem. n. 7. tamen patitur pœnam arrarum. L. ultim. eod.

(*g*) Sichard. in L. 1. de Sponſ. C. n. 6.

(*h*) Gloſſ. Cyn. & Sichard. in d. L. 1.

(*i*) Panor. in c. requiſivit. de Sponſ extra. n. 6. Nic. Everard. conſil. 178. n. 7. *ubi refert quod licet Sponſalia non ſunt jurata, tamen ad illorum Solemnizationem & obſervationem, Sponſa ab initio voluntaria, & poſtea renitens, & invita compelli poteſt niſi urgentiſſima Cauſa ſupervenerit vel ſubſit, & quod ita tenent communiter* DD.

(*k*) c. 1. de pactis extra. & ibi DD. Panor. in c. requiſivit. de Sponſ. n. 6. verſ. In contrarium, &c. & in c. ex literis el. 2. n. 3. Summa Hoſtienſ. Tit. de Sponſal. §. quis ſit. effectus. n. 9 (*l*) Panor. in d. c. requiſivit. Everard. conſil. 178. n. 7. (*m*) Vide Henr. Boi. in c. requiſivit. de Sponſ. extra. & Covar. Tract. de Sponſal. 1. parte. c. 4. n. 2, 3, 4, 5, & 6. (*n*) c. ſicut. & c. ſi inter de Sponſal. extra. (*o*) Everard. d. conſ. 178. quod videto. Covar. tract. de Sponſ. 1. parte c. 4. n. 2, 3, &c.

willing

willing Party may be compelled (*p*), the second pronouncing that the Party is rather to be admonished (*q*); For the reconciliation of which two places divers distinctions have been devised (*r*). First, that the former Text is true by the rigour of the Law; the second by the mercy and equity thereof (*s*). Next, that the former Text proceedeth not simply, but conditionally; and that the second Text hath place, if otherwise the Party cannot be made willing (*t*). Thirdly, that the former Text proceedeth simply, and that the Party is to be compelled precisely by reason of the Oath (*u*); and that the later Text is thus to be expounded, the word [*potius, rather*] is to be turned into [*prius, first*] (*x*); and so where it is there said, that the Party is rather to be monished than compelled, the Sense is, the party is first to be monished, and then compelled (*y*); thus they go about to reconcile the two places: But the true and common approved reconciliation is this; either there is *just Cause* of refusal, or not (*z*); if there be *just Cause* already ministred, as if the other party have committed Fornication (*a*), or be stricken with Leprosy, Palsy, or some notable deformity (*b*), or that some impediment have happened (*c*), for the which Spousals may be dissolved (whereof hereafter), In this Case the Party may be monished, but not compelled to the Observation of his Oath (*d*): For in every promise and Action, a just and reasonable Cause is still excepted (*e*), being a secret Condition evermore understood, though never expressed: If there be not *just Cause* precedent, then the unwilling Party is to be admonished; and if he yet obstinately refuse, he

(*p*) c. ex literis. el. 2. de Sponsal. extra.

(*q*) c. requisivit. de Spons. extra.

(*r*) Gloss. & DD. in d. c. ex literis.

(*s*) Gloss. in d. c. ex literis. verb. compellas. in princ. Arg. c. præterea eod. Tit. *ne*, viz. *deterius inde contingat.*

(*t*) d. gloss. arg. c. Vides 22. q. 4.

(*u*) Prælleg. gloss. Arg. c. Sacerdotes & c. Ecce Crimina. 24. q. 3.

(*x*) d. gloss. in fin.

(*y*) præall. gloss. *quam sequitur* Gubertus Costanus, Tract. de Sponsal. fol. 32. n. 5.

(*z*) Henr. Boic. in c. requisivit. de Sponsal. extra. & ibi Panor. n. 4. Præpos. in c. ex literis. el. 2. eod. n. 8. *quam distinctionem* DD. *communiter probant*, ut per Præpos. ibidem.

(*a*) Præpos. in c. ex literis. el. 2. n. 8.

(*b*) Vide Melchior. Kling. Tract. de caus. Matrimonial. fol. 5. in fin.

(*c*) *Puta Consanguinitatis, vel affinitatis, &c.* gloss. in d. c. ex literis. verb. rationabilis Causa.

(*d*) Henr. Boic. Panor. & Præpos. ac communiter DD. in c. requisivit. & c. ex literis. de Sponsal. extra.

(*e*) Henr. Boic. in d. c. requisivit. Kirkhov. in lib. 2. consil. Matrimonial. consil. ibidem. 27. n. 23.

(*f*) *Tacitarum Conditionum varia Exempla*, vide apud Olden. in Topicis legal. Loco ab auctoriate fol. 105, 106.

is to be compelled by the Censures Ecclesiastical to Solemnize the Matrimony, by him before promised and Sworn (g); nor is he or she so refusing, to be absolved, unless there be *just Cause* of fear of future mischief, and greater danger like to ensue such hateful Conjunction (as Murthers, Adulteries, and such sad and tragical events) left to the sound discretion of the Wise and just Judge, by him to be uprightly weighed and indifferently ballanced (h); For in this Case the Judge is to abstain from further Compulsion, and to absolve the desperate Person (i), lest that which is feared, come to pass to both their destructions, and publick Scandal of the Church (k).

(g) Præpos. in d.c. ex literis. de Sponsal. extra. n. 8 & ibi Panor. n.5. & in c. de illis. de desponf. impub.n. 6. Idem Panor. Consil. 48. vol.1.

(h) Henr. Boic. in c. requisivit. de Sponsal.extra. col.1.vers. aut sive Panor. eod.c.n.4. Covar. Tract. de Sponsal. 1. parte c. 4. n. 5. Sichard. in L. 1. C. de Sponf. n. 11, 12, & 13.

(i) *Etiam non petenti impendenda est absolutio omnino pertinaci.* Ita Præpos. post. Jo. And in c. ex literis. el. 2. in fin. de Sponf. extra. *alioquiilla pœna quæ medicinalis dicitur, non ad constructionem sed ad distructionem adhiberetur.* Boic. in d. c. requisivit

(k) Boic & communiter DD. in d.c. requisivit. Covar. tract. de sponf. 1. parte. c. 4. n.5.

6. The third Question is this, What if a Man do [*swear that he will Marry such a Woman*] which Woman is absent then, and ignorant of his Oath, but afterwards being certified thereof, doth ratifie and confirm the same, which done, the Man and the Woman do lye together, whether is this Matrimony or no?

It is answered that it is (l), because by the presumption of Law Spousals are translated into Matrimony, by carnal Copulation (m); howbeit the aforesaid Conclusion is then understood to be true, in Case the Man did continue and persevere in the same mind, until the Woman did also consent, without repentance, or revocation in the mean time, otherwise not (n); as heretofore hath been disputed at large.

(l) Præpos.in c. ex literis el.2.de Desponf.extra. n.4. vers.sed opportune,&c.

(m) c. is qui fidem de Sponsal. extra.

(n) Præpos. ubi supra.

7. The last Question shall be this, a Man doth promise and *swear* unto the three Daughters of such a Person, that

that he will Marry *one* of them, wherewith they are content; Afterwards he lieth with *one* of them, whether are theſe two hereby made Man and Wife, yea, or no? It may ſeem they are not, becauſe they had not contracted Spouſals before they did lye together (*o*); And that appeareth by this, Until that time it was in his choice to have marryed any one of all the three Daughters whomſoever; ſeeing then he might lawfully have marryed any one of all the three, it followeth that he had not contracted Spouſals, otherwiſe he could not have marryed any one of them whom he would; wherefore no Spouſals being firſt contracted (*q*), no Matrimony can follow, by their only lying together, or knowing each other carnally (*r*).

(*o*) Gloſſ. in c. ex literis. el. 2. de Sponſ. & Inno ibidem (*p*) Innoc. & Henr. Boic. in d. c. ex literis. vide Covar. tract. de Sponſal. 1. parte c. 4. §. 1. n. 17. circa medium, *ibi poteſt enim, &c.* (*q*) *Nimirum* (*r*) Gloſſ. in d.

propter publicæ honeſtatis juſticiæ impedimentum c. 1. de Sponſal. in Sext. c. ex. literis quam ſequuntur Inno. Anto. Henr. & Præpoſ.

8. Nevertheleſs, by the common Opinion, the Law preſumeth Matrimony to be contracted betwixt the ſaid Parties in this Caſe (*s*); for ſeeing he was bound to marry one of them three (*t*), he is preſumed to have made choice of her for his Wife, with whom he had to do, as with his Wife (*u*); for if a Man contract Spouſals conditionally with a Woman, theſe are uncertain Spouſals, ſo long as the Condition is in ſuſpence; and yet nevertheleſs, if in the mean time he have acceſs to her, as to his Wife, theſe doubtful Spouſals do thereby paſs into Matrimony (*x*); and ſo in the queſtion propoſed, albeit the Spouſals be uncertain, yet their lying together doth make the ſame uncertain Spouſals,

(*s*) Hoſtienſ. & Panor. in d. c. ex literis. Silveſtr. Prier. verb. Matrimonium el. 2. q. 11. Covar. tract. de Sponſal. 1. parte. c. 4. §. 1. n. 17. Menoch. de præſump. lib. 3. præſump. 1. n. 13. *quorum hi duo teſtificantur hanc opinionem eſſe communem.*

(*t*) *Nam cum licitum ſit Juramentum, tenetur illud implere, Saltem ex officio Judicis, licet aliquam dictarum mulierum nondum cognoviſſet c. Si verò*, de Jurejur. extra. Henr. Boic. in d. c. ex literis, Innocentius ex vi promiſſionis, unam ex illis ducere in uxorem. Covar. ubi ſupra. (*u*) Hoſtienſ. & Panor. in d. c. ex literis. Covar. & Menoch. ubi ſupra. (*x*) Covar. tract. de Sponſal. infra. parte. c. 4. §. 1. n. 17. in fin. per c. ſuper eo & c. per tuas de condic. appoſ. extra. Menoch. de præſump. lib. 3. præſ. 2. n. 14.

to become Matrimony, aſwell as in the former Caſe (*y*).

(*y*) Covar. & Menoch. in locis prælleg.

9. Again, that favourable Preſumption is to be preferred in all doubtful Caſes, whereby Sin and Wickedneſs may be avoided (*z*): Now to preſume that theſe two Perſons had any other purpoſe in dealing together, than that which is agreeable to the Office and Duty of Husband and Wife, were to preſume both Adultery and Perjury (*a*); and therefore this ſinful Preſumption is to be rejected, and the contrary received (*b*): Where it is ſaid on the other ſide, that there was not any precedent Contract of Spouſals betwixt them two, and therefore no ſubſequent Matrimony to be preſumed, by reaſon of their lying together; The Antecedent is to be denied (*c*). For ſeeing by his promiſe and Oath he was bound to marry one of them three (*d*), Certain it is, that he for his part had contracted Spouſals, though uncertain; and on the other ſide the three Siſters they are likewiſe deemed every one of them to have conſented, that ſhe ſhould be his Wife, whom he would chuſe (*e*). So that for their parts, there is alſo Spouſals contracted, and ſo on both parts, though as yet uncertain; Which uncertain Spouſals become Matrimony by carnal Copulation (*f*), as is aforeſaid. If any do reply, that he could not contract Spouſals with three Siſters; True it is, that he cannot contract Spouſals with three Women at once, (as I promiſe to marry you three) neither yet with three Siſters at ſeveral times; for being firſt eſpouſed to one of them, by the Canon Law, he is forbidden to contract Spouſals with any of the reſt; albeit, the firſt contract were void (*h*), by reaſon of the impediment of the *Juſtice* of *publick honeſty*, whereof elſewhere: But if he promiſe to marry one of them three only, whom he ſhall chuſe, and they agree thereunto, this Contract is not unlawful (*i*), for here each of them is preſumed to conſent

(*z*) Panor. in d. c. ex literis el. 2. n. 7. de Sponſal. c. Eſtote de Reg. jur. extra.

(*a*) Panor. ubi ſupra.

(*b*) Ibidem.

(*c*) Covar. de Sponſal. 1. parte c. 4. §. 1. n. 17. Menoch. de præſump. lib. 3. præſ. 2. n. 14.

(*d*) Covar. & Menoch. in locis præd.

(*e*) Hoſtienſ. in c. ex literis el. 2. de Sponſal. extra. & Præpoſ. ibidem n. 6.

(*f*) c. ſuper eo. & c. per tuas. de Sponſ. extra.

(*g*) c. 1. de Sponſal. in Sext.

(*h*) d. c. primo. in princ.

(*i*) Hoſtienſ. & DD. communiter in c. ex literis el. 2. de Sponſal. extra.

consent *conditionally*, if he shall chuse her to be his Wife (*k*): In which Case if he lye with any one of them, he is presumed to have made choice of her for his Wife, and so to have purified the Condition (*l*); And such is our Case: Wherefore by the received Opinion, the uncertain Spousals are made Matrimony by succeeding Copulation (*m*): Which Conclusion hath place, when as he doth promise to marry *incertam ex certis*, an uncertain Woman of a certain Company, as in the former instance; but not when as he doth promise to marry, *incertam ex incertis*, an uncertain Woman of an uncertain Company; As for Example, A Man doth promise and swear to marry one of the Subjects of such a Prince; for albeit he do afterwards lye with one of them, yet is not this Matrimony (*n*), because he may notwithstanding marry another of them (*o*); but when he doth lye with one of the Sisters, he cannot afterwards marry another of the Sisters, because of the *affinity* newly sprung up, by having Carnal knowledge of one of them before (*p*).

(*k*) Præpos. in d. c. ex literis. n. 6.

(*l*) Præpos. post. Hostiens. & Panor. in d. c. ex literis.

(*m*) Hostiens. Panor. Prier. Covar. Menoch. & alij locis prælleg.

(*n*) Præpos. in c. ex literis el. 2. de Sponsal. extra. n. 5. in fin. & ibi Panor. n. 7. in fin.

(*o*) Panor. & Præpos. ubi supra.

(*p*) Hostiens. Panor. & Præpos. in d. c. ex literis. *quorum opinio communiter tenetur ex relatione* Præpos. in d. c. n. 5. in fin.

SECT.

SECT. XVII.

Of the Effects of Spousals.

1. Divers are the *effects* of Spousals, whereof the first and principal is this; The Parties which have contracted Spousals together, are bound by the *Laws Ecclesiastical* of this Realm, to perform their promise, and to celebrate Matrimony together accordingly (*a*): Which Conclusion is both extended and restrained, as may appear by the Ampliations and Limitations following.

(*a*) Covar. Tract. de Sponsal. 2. parte c. 4. in princ. Lindwood in c. Statutum verb. Solururum. de testa. lib. 3. provinc. constit. Lancelot. lib. 2. Instit. jur. can. tit. de Sponsal. §. initiatum Costan. de Sponsal. fol. 32. & nu. 2.

2. The first Ampliation is this, that not only they which do contract Spousals *de præsenti*, but also they which do contract Spousals *de futuro*, are bound to the performance thereof (*b*).

(*b*) c. de illis el. 1. de desponsat. impub. extra. & ibi Panor. & in c. ex literis. el. 2. de Sponsal. & ibi DD.

3. Secondly, the affianced Parties are bound to the performance of the Contract; Albeit the same were made without an *Oath* (*c*).

(*c*) c. de illis el. 1. de Desponsat. impub. extra. ubi hoc notat. Abb. Hostiens. & Henr. Idem Covar. Tract. de Sponsal. 1. part. c. 4. in princ. nu. 2.

4. Thirdly, Albeit one of the Parties affianced do afterwards also contract Spousals with another Person, and confirm the same with an *Oath*, yet is the first, though unsworn Contract, to be performed (*d*).

(*d*) Jo. And. Abb. & Præpos. in c. sicut de Sponsal. Covar. ubi supra. *quem vide.*

5. Fourthly,

5. Fourthly, not only they which have contracted Spousals are bound to perform the same, but they also which do *promise*, that they will contract Spousals (*e*). p. 71 232, 231.

(*e*) Covar. tract. de Sponsa. 1. parte c. 4. in princ. per L. si fidejussor. §. meminisse. ff. de leg. 1. & per. L. *Si quis Stipulatus sit Stichum.* §. ultim. de verb. oblig. ff. Nich. Boer. decis. 13. n. 3

6. Fifthly, the Parties, having contracted Spousals *de præsenti*, albeit, the one Party should afterwards marry another Person, in the face of the Church, and should Consummate the same by Carnal Copulation, and Procreation of Children, notwithstanding the first Contract is good, and shall prevail against the second Marriage (*f*).

7. The Limitations of the former Conclusion are these. First, where the Parties espoused were not of Ripe Age at the time of the Contract; for coming to years of consent, they may lawfully dissent without danger (*g*).

8. Secondly, when as the Spousals be conditional, the Condition not being performed, the Parties are not bound to marry together (*h*), unless the Condition be impossible, or unhonest, as hath been before declared (*i*).

9. Thirdly, when as either Party having contracted Spousals *de futuro*, doth afterwards Contract Matrimony or Spousals *de præsenti*, with another Person (*k*); or else contract Spousals *de futuro* with another Person, and then they lye with the same Person (*l*); For in both these Cases the former Spousals are dissolved by the later.

(*f*) c. Si inter. de Sponsal. extra.

(*g*) c. de illis. el. 1. de despons. impub. extra.

(*h*) c. 1. §. ultim. de Sponsal. in Sext. c. super eo de Condic. appos. extra.

(*i*) Supra §. 12.

(*k*) c. sicut. & c. Si inter. §. ultim. de Sponsal. extra.

(*l*) Jo. And. & Butr. in c. is qui fidem de Sponsal. extra. Menoch. de Præs. lib. 3. Præs. 2. n. 17.

10. Finally, when as the Spousals be unlawful (*m*), whether it be by reason of impediment in the Person,

(*m*) Summa Hostiens. Tit. de Sponsal. §. quis sit effectus. in princ. ibi & Menoch. tract. de Præsump. lib. 3. præs. 2. n. 27. Sichard. in L. 1. C. de Sponsal. n. 16, 17, 18.

son, (for that they be of kin or allyed within the Degrees prohibited) or for want of Consent (as by occasion of fear, furor, drunkenness, &c.) in these and the like Cases Spousals are destitute of effect (*n*).

(*n*) *quod enim nullum est, executionem aut effectum non meretur.* L. 4. §. condemnatum. de re. jud. ff. adde Pan. in c. Is qui fidem de Sponsal. extra. Præpos. in c. de illis n. 4. vers. & sic notate. de condic app. extra. Felin. in c. Cum M. Ferrariensis. col. pen. de constitut. extra. Menoch. d. Præs. 2. n. 27. Sichard. in L. 1. C. de Sponsal. n. 16, 17, 18.

11. The second effect is, that Spousals *de futuro* do become Matrimony by carnal knowledge, betwixt the Parties betroathed (*o*); The Ampliations of which Conclusion are these.

(*o*) c. Is qui fidem de Sponsal. extra. Menoch. tract. de præsump. lib. 3. præs. 2. n. 6. Melchior. Kling. de cons. Matrimonial. fol. 5.

12. First, albeit either Party betroathed should afterwards marry another Person in the face of the Church, and should also lye with the said new married Person; Yet this Marriage solemnized and consummate notwithstanding, the Party so marrying is to be compelled to return to his or her foresaid Spouse, formerly known (*p*).

(*p*) Eod. c. id. qui & c. veniens. de Sponsal. extra.

13. Secondly, albeit the Parties betroathed should protest before the Act done, that they did not *intend* thereby, that the Spousals should become Matrimony, yet this protestation is overthrown by the fact following (*q*); for by lying together, they are presumed to have swarved from their former unhonest protestation (*r*); And so the former Spousals are now presumed honest Matrimony (*s*).

(*q*) c. per tuas. de condic. appos. extra. & ibi gloss. Panor. & alij Covar. Tract. de Sponsal. 1. parte. c. 4. §. 1. n. 18.

(*r*) Gloss. in d. c. per tuas. & ibi Panor. n. 6. de Condic. app. extra.

(*s*) Panor. in d. c. per tuas Covar. ubi supra. Menoch. Tract. de præsump. lib. 3. Præs. 2. n. 15.

14. Third-

14. Thirdly, albeit, he or she which did contend that Matrimony was contracted, should after the deed done confess, that they did not thereby intend to make Matrimony; yet so strong is the presumption of Law (*t*), in favour of Matrimony, as this Confession doth not work any thing against it (*u*).

(*t*) *Est enim præsumptio non juris tantum, sed juris & de jure.* Gloss. communiter recepta. in d. c. is qui fidem. Abb. & Felin. in c. quanto de præsump. Alciat. tract. de præsump. in princ. n. 8. (*u*) Abbas Præpos. & alij in d. c. is qui fidem. de Sponsa. extra. Covar. tract. de Sponsal. 1. parte. c. 4. §. 1. n. 3. *ubi fatetur hanc opinionem esse com. à quâ tamen ipse postea recedit.* ibidem. n. 4.

15. Fourthly, albeit, one of the Parties betroathed should commit Fornication, yet if after this Crime committed, the said Parties formerly betroathed shall know each other carnally, the said Crime doth not hinder the passage of the Spousals into Matrimony (*x*), seeing the same Spousals were not dissolved, but *dissoluble* by occasion of Fornication (*z*).

(*x*) Gloss. in c. de illis el. 1. de desponsa. impub. Henr. Boic. & Præpos. in c. de illis., de Sponsa. extra. Menoch. tract. de præsump. lib. 3. præs. 2. n. 18. (*y*) Menoch. ubi supra. post. Covar. Tract. de Sponsal. 1. parte. c. 4. §. 1. n. 8.

16. Fifthly, albeit the Woman were betroathed against her Will, yet if she suffer her self to be known by him, to whom she was espoused, she is presumed to have consented unto him, as unto her Husband (*z*), whereby the Spousals are made Matrimony (*a*).

(*z*) c. Significavit de eo qui dux. in matr. quam poll. & c. Insuper. qui matr. accus. poss. (*a*) d. c. Significavit. Menoch. Tract. de præsump. lib. 3. præs. 2. n. 21. & præs. 4. in fin.

17. Sixthly, albeit, the Woman be uncertain; As if a Man do swear to three Sisters, that he will marry one of them; for by lying with one of them, those Spousals become Matrimony (*b*): As heretofore I have confirmed (*c*).

(*b*) Hostien. & Panor. in c. ex literis. el. 2. de Sponsa. extra. Menoch. de præsump. lib. 3. præs. 2. n. 13. (*c*) Supra. §. prox.

18. Seventhly, Spousals *de futuro*, become Matrimony by carnal Copulation, albeit either party had first contracted Spousals with some other Persons (*d*).

(*d*) Joan. & Butr. in c. is qui fidem. de Sponsal. extra. Menoch. Tract. de præsump. lib. 3. præs. 2. n. 17. Silvestr. Prier. in Summa. verb. Sponsalia. q. 10. Covar. tract. de Sponsal. 1. parte. c. 4. §. 1. n. 10.

19. Eightly, Spousals do become Matrimony by carnal knowledge, albeit the Man were constrained, through *fear of death* to know the Woman (*e*).

(*e*) Hostiens. in d c. is qui fidem fecit, Covar. tract de Sponsal. 1. parte c. 4. §. 1. n. 11. *ratio quam ibi assignat hæc est, illa etiam Copula, si fornicario affectu peracta fuerit, etiam metu acerrimo, peccatum erit mortale, Id quod præsumi non debet in Sponso, sed potius, secluso metu, affectum habuisse conjugalem; præterea coeunte viro, excluſus est metus, quia si interfuisset metus, cessaret coeundi desiderium, sine quo frustra adhiberetur coeundi conatus.* Covar. ubi supra & Menoch. tract. de præsump. lib. 3. præs. 4. n. 33.

20. Finally, albeit the Man do by violence carry away the Woman, with whom he hath contracted Spousals, and have to do with her, hereby Spousals are become Matrimony (*f*).

(*f*) Paul. de Castr. in L. Raptores, C. de Epis. & cler. n. 3. per. c. pen. de rapt. extra. Menoch. de præsump. lib. 3. præs. 2. n. 23.

21. The Limitations of the former Conclusions are these: First, when as it doth appear that the Spousals were dissolved, either by mutual Consent, or by some other lawful means (whereof mention is made in the next Paragraph) before the Parties did lye together, for dissolved Spousals do never become Matrimony, albeit the Parties do afterwards know each other (*g*); And so it is, if the Spousals were void from the beginning, by reason of any just Impediment, as of Consanguinity

(*g*) Menoch. de præsump. lib. 3. præs. 2. n. 26. Panor. in c. per tuas de cond. app. extra. Sichard in L. 1. de Sponsal. C. n. 4. in fin.

or

or Affinity within the Degrees prohibited, or ſuch like (*h*).

(*h*) Menoch. d. præſump. 2. n. 27. Panor. in c. Is qui fidem. de Sponſal. extra. n. 5. verſ. Secus ſi, *&c.* Præpoſ. in c. de illis de cond. app. n. 4. verſ. *& ſic notate, &c.*

22. Secondly, Spouſals do not become Matrimony, when as the Parties did lye together before they were contracted, but not after (*i*).

(*i*) Panor. in c. veniens. el. 2. de Sponſal. extra. Henr. Boic. in c. Atteſtationes. ult. col. de deſponſ. impub. Covar. tract. de Sponſal. 1. parte. c. 4. § 1. n. 13. contra. Hyppol. Sing. 500. *Ubi citat alios ita tenuiſſe, qui tamen ita non tenuerunt, ut latiùs* per Covar. ubi ſupra.

23. Thirdly, if the Parties having contracted Spouſals *de futuro*, do afterwards know each other, but in truth not with that affection, which doth become Man and Wife, but (as Adulterers do) with a beaſtly purpoſe only to ſatisfie their foul Luſts, in this Caſe it is not true Matrimony in Conſcience; neither are they Man and Wife before God (*k*), though it be otherwiſe in Mans Judgment (*l*); becauſe the Law preſumeth, that the Parties eſpouſed in knowing each other, had no foul intent of committing Fornication, but an honeſt affection as is meet for marryed Perſons (*m*); nor doth the Law permit that they ſhould be credited in affirming the contrary (*n*): Hence is it, that if the one of them ſhould marry another Perſon, This Marriage is good indeed before God, but not in the Conſiſtory or judicial place of Mortal Man (*o*), whoſe Sentence is to be directed by the Rules and Precepts of the Law (*p*); and therefore if the unmarried Party, with whom Spouſals were firſt contracted, ſhould commence Suit againſt the Party precontracted, to ſolemnize Matrimony, and to per-

(*k*) Panor. in c. is qui fidem. de Sponſal. extra. n. 5. Covar. tract. de Sponſal. 1. parte. c. 4. §. 1. n. 9. Socin. conſil. 28. vol. 1. Prier. verb. Matrimonium. el. 2. q. 15.

(*l*) per loca præalleg.

(*m*) Gloſſ. & DD. in L. Is qui fidem. de Sponſal. extra.

(*n*) c. Tua nos. de Sponſal. extra. & ibi Panor. & alij Covar. tract. de Sponſal. 1. parte. c. 4. §. 1. n. 9.

(*o*) Panor. Præpoſ. & DD. in c. is qui fidem de Sponſal. extra. Prier. verb. Matrimonium. el 2. q. 15. Covar. d. c. §. 4. 1. n. 9.

(*p*) Lib. 4. Inſtit. Tit. de Offic. Jud. in princ.

form the duties of Marriage, notwithſtanding the ſecond Marriage, the Judge were to give Sentence accordingly (*q*); and yet in Conſcience and before God, the ſame were unlawful, ſo that it were better for the Party convented to endure the Cenſures Eccleſiaſtical, than to undergo that Sentence (*r*).

(*q*) Panor. & Præpoſ. in d. c. is qui fidem.

(*r*) Præpoſ. poſt Vincen. in d.c. is qui fidem. de Sponſ. extra. n. 3.

24. Fourthly, when as the Parties themſelves betroathed, do not verily and actually know each other, but only endeavour and aſſay ſo to do, the Spouſals *de futuro* are not hereby reſolved into Matrimony (*s*), unleſs they were Spouſals by interpretation of Law only; as when two Children are contracted by words of preſent time, for theſe Spouſals are transformed into Matrimony by ſole endeavour, after the Parties have attained to lawful Age (*t*).

(*s*) c. ultim. de Sponſal. extra.

(*t*) c. Atteſtationes & ibi Præpoſ. & Henr. Poic. de Sponſ. impub. Idem Præpoſ. in cultim. de Sponſal. extra. n. 3. & ibi Card. n. 2. Pariſ. conſil. 51. n. 9. cum Seq. vol. 4. & in conſ. 62. n. 9. eod. vol.

25. The Third effect ariſing from Spouſals is that impediment which is called *publicæ honeſtatis Juſtitia* (*u*), the Juſtice of publick honeſty, whereby either Party having contracted pure and certain Spouſals, albeit only *de futuro*, are prohibited to marry any of the others Kinſfolks within the Degrees prohibited; So that the Man is not to marry any of the Kinſwomen of the Woman, with whom he had contracted Spouſals, neither the Woman to marry any of the Kinſmen of the Man, within the Degrees of Conſanguinity prohibited (*x*); which impediment of the Juſtice of publick honeſty by the Laws Eccleſiaſtical, is not only prohibitory, but deſtructory, that is to ſay, it doth not only forbid ſuch Marriages to be contracted, but it doth *deſtroy the ſame* being ſolemnized (*y*); but whether this impediment be now of force within this Realm of *England*, ſhall appear hereafter.

(*u*) c. ad audientiam. et c. Sponſam, de Sponſal. & Matrimonijs. extra. c. 1. de Sponſal. lib 6.

(*x*) d.c. Ad audientiam. & c. Sponſam, & DD. ibidem. Sichard. in L. 1. de Sponſal. C. n. 8.

(*y*) Panor. in d. c. Sponſam in fin. c. unic. de Sponſal. in Sext. & ibi Dominic. de S. Gem. & Phil. Franc.

26. The

26. The Fourth effect proceeding from Spousals, is the penalty whereunto the Party is Subject, which doth revolt from performance of the promise of future Marriage, which penalty by reason of many Laws is manifold: By the Civil Law, whosoever having contracted Spousals *de futuro*, doth, without just Cause, refuse to deduce the same Spousals into Matrimony, doth not only lose the token (which is commonly a Ring) given to the other Party in pledge, and earnest of the Contract (z), together, with all other gifts whatsoever simply bestowed in hope of future Marriage (*a*); but is bound to make two-fold Restitution for the tokens and pledges received in Confirmation of the said Contract (*b*), whether they be Rings, Braceletts, Jewels, or other things, not consisting in weight, number or measure (*c*), the which the Civil Law doth call *Arrabo* (*d*), being as it were the earnest peny, whereby any bargain is knit up, and fully concluded betwixt the Parties (*e*); but if the Marriage did not proceed, and yet the Party is in no fault (whether it were by reason of Death or of Prohibition by the Superior Magistrate, or of new affinity overtaking them within the Degrees prohibited:) In this Case those gifts conferred in hope of Marriage, were not lost, but might be recovered (*f*); yet with this difference, that is to say, if the Woman betroathed, receiving those gifts, did bestow a Kiss upon her future Husband, then might she retain the one half thereof (*g*), otherwise he might recover the whole (*h*); for so religious, or rather so *ridiculous* were the *Italians* and *Spaniards* in this point, that they

(z) L. Contractus. §. illud C. de fide Instr. L. 3. C. de Sponsal. Sichard. in L. is de don. ante nup. C.

(*a*) Sichard. in Rub. de don. ante nup. n. 8. & 9. *ubi etiam videre licet Doctrinam inter donationem propter nuptias, & Sponsalitiarum largitatem.*

(*b*) L. ultim. C. de Sponsal. *Quod verum quidem est, Si modo sit major 25 annis, sin vero minor, tunc solum tenetur ad Arras quas* recepit. eod. l.

(*c*) *Arræ vero dari possunt, non solum in rebus quæ numero, pondere, & mensurâ consistunt, ut quæ facillimè duplicari possunt, verum etiam in Speciebus vel Corporibus, quæ licet multiplicari non possunt, tamen æstimatio erit loco Corporis, & ita accipient, in Arram, fundum, si resiliat absque Causa tenebitur restituere fundum, & deinde æstimationem, & hæc opinio communis est contra* Bar. teste Sichardo in L. 1. C. de Sponsal. n. 14. & 15. (*d*) L. Arris & L. ultim. C. de Sponsal. (*e*) DD. in d. l. Arris & L ultim. (*f*) L. cum veterum de donac. ante nup. C. & ibidem Sichard. (*g*) L. si à Sponso de don. ante nup. C. (*h*) Eod. L. Si à Sponso.

they thought her half known if once she kissed a Man (*i*); And so impatient is the Jealousie of those Husbands (though very unchast themselves) that (for the most part) they accompt it *half Adultery* if any other do but kiss their Wives (*k*); and it is severely punished as a grievous offence, if any do so (*l*). Wherefore seeing amongst them she is thought to be half defloured which kisseth a Man, no marvel if she retain half those gifts, which otherwise she should have retained wholly, if she had wholly surrendred the full possession of her Body into his power (*m*): But the Civil Law in this respect is of no more force with us in *England*, than it is with them in *France*, of whose natures and conditions, not varying herein from the manners and Customs of this Country, *Guibertus Costaneus* Senator of *Tholosse* doth write in these Terms; *Apud* Gallos *urbanitatis officij & Salutationis ergô, viri & mulieris oscula vicissim præbent, etiamsi nulla Cognationis vel Affinitatis gradu se contingant; Ergo propter solam osculationem, nihil apud nos lucrari debet Sponsa; alioquin ab omnibus, qui officij vel urbanitatis causâ disponsatam mulierem oscularentur, ea posset aliquid eo nomine petere, quod est prorsus ridiculum; valeant igitur illæ leges, quæ nulla ratione apud nos sustineri possunt, & apud* Italos, Hispanos *& alios qui invisam osculationem habent, vim suam obtineant* (*n*): With the *French* (saith he) Men and Women do kiss together in argument of Curtesy, Duty and Salutations, although they be not within any Degree of Consanguinity or Affinity; And therefore the betroathed Woman ought to gain nothing for a Kiss only; otherwise she might in that respect demand somewhat of every one, which for Duties or Courtesies sake, should kiss her, being affianced, which is very ridiculous,

(*i*) Anto. Gubert. Constan. tract. de Sponsal. n. 12, 13. c. nec. in aliqua 27. q. 1.

(*k*) *Unde* Ovidius, *Oscula si dederis, fiam manifestus amator.* Et alibi. *Et dicam hæc mea sunt, Injiciamque manus, Oscula qui sumpsit, si non & cætera sumpsit, Hæcquoque quæ sumpsit te dare dignus erat.*

(*l*) Gubertus ubi supra. Bald. in c. tuæ de procur. extra. gloss. in L. 1. de Extraord. crim. & in c. nec oportet 81. distinct. Text. in c. 1. Quibus mod. feud amitt. Alciat. lib. 4. perergon. c. 10.

(*m*) *Intellige dona simplicia, quæ aliàs Sponsalitiælargitatis nomine comprehendantur; sequutus namque*

nuptijs usque adeo valet hujusmodi donatio, ut soluto postea Matrimonio, res donata non venit restituenda viro, utcunque diversum obtineat in donatione, quæ dicitur propter nuptias. Sichard. in Rub. & in L. 1. C. de donatione, an. nup. vide Perkins tit. Feofments. fol. 40. n. 195. (*n*) Tract. de Sponsal. fol. 35. n. 13.

lous. Farewel therefore those Laws, the which by no reason can be sustained with us; and let them prevail with the *Italians*, *Spaniards*, and others which envy kissings, &c. Wherefore by the Laws of this Realm, what the Woman receiveth in Consideration of future Marriage, in case the same Marriage do not succeed, she is either wholly to restore, or wholly to retain, according to the variety of the *Covenants* and *Conditions* concluded upon betwixt the Parties (*o*); nor doth the kissing or not kissing make any difference therein: And if it fall out, that she be in fault, yet is she not tyed to make double restitution (*p*); albeit the things were given and received as tokens and pledges of the Contract, which the Civil Law termeth *Arra*; And so it is if the Man be in fault.

(*o*) D. Smith in tract. de republic. Angl. l. 3. c. 6. in fin. vide Perkins. Tit. Feoffment fol. 40. n. 194, 195.

(*p*) *Id quod plus est quam manifestum per totum regnum* Anglia.

27. By Laws Ecclesiastical of this Realm, if any having contracted Spousals, and being convented and adjudged to celebrate Matrimony accordingly, do refuse to undergo the Execution of the Sentence pronounced by the Ecclesiastical Judge; after lawful admonition given in that behalf, he or she so refusing may for his or Contumacy or disobedience therein, be *Excommunicated* (*q*): And if the Party Excommunicate do still persevere in that State by the space of *forty* days, the Ordinary may by a Significavit or Certificate under his Seal, certifie into the Chancery the Contempt of the Party; and craving the aid of the Secular Power (*r*), Whereupon a Writ *de Excommunicato Capiendo* is to be directed to the Sheriff, for the apprehension of the Body of the same Party Excommunicated (*s*); who being apprehended

(*q*) c. ex literis. el. 2. de Sponsal. extra. & ibi Præpos. n. 3. in fin. c. 1. de Sponsal. duorum & ibi Panor. c. sicut ex literis. & ibi DD. de Sponsal. Gubert. Costanus tract. de Sponsal. fol. 32. n. 2. c. Juramenti 22. q. 5.

(*r*) Lindwood in c. præterea. de Sen. Excom. lib. 5. provincial. Constitut. Cant. verb. regni Consuetudinem. (*s*) Articuli Cleri c. 12. Lindwood in d. c. præterea. & in c. vinc. de cohabic. cler. & mul. Fitzherbert na. Brev. Brevе de Excommunicato capiendo fol. 62. Terms of Law, verb. Excommengment.

by

by vertue thereof, is to be kept in Priſon, without Bail or Mainpriſe, until he or ſhe have humbled themſelves, and obeyed the Monition of the Ordinary (*t*), which when it is done, and the Church and Party both ſatisfied, then is the Ordinary to abſolve the Party, and to certifie the ſame into the aforeſaid Chancery (*u*): Whereupon a Writ is to be directed as before, for the releaſe of the Parties Impriſonment, which Writ is called *Breve de Excommunicato deliberando* (*x*); To this puniſhment are they ſubject which have contracted Spouſals *de præſenti*, and afterwards refuſe to undergo the holy Bond of Matrimony (*y*).

(*t*) Lindw. ubi ſupra. Fitzherbert in d. Br. de Excommunicato capiendo.

(*u*) Fitzherbert in d. Br. Stat. Eliz. An. 5 c. 23.

(*x*) Fitzherbert d. loco. Terms of Law. verb. Excommengment.

(*y*) c. Si inter de Sponſal. & c. 1. de Sponſ. duorum extra. & DD. ibidem.

Ad l. 223.

28. But as for ſuch as have contracted Spouſals only *de futuro*, if either of them do refuſe to perform their promiſe, foraſmuch as the Text ſaith, that ſuch an one is rather to be admoniſhed than compelled (*z*); and leſt that puniſhment ſhould by practice grow mortal, which by Inſtitution is medicinal (*a*): I do think that the Judge is not to proceed to the *Significavit*, but rather to abſolve that curſed Party which contemneth the Cenſures of the Church (*b*), albeit there be no Cauſe of favour, but fear of further miſchief, by compelling them to go together, which hate one another (*c*). Yet is not this froward Party thus to be diſmiſſed, but is to ſuffer pennance *propter læſionem fidei*, for breach of his promiſe (*d*); nor is he or ſhe either to be diſmiſſed, or abſolved, if thoſe Spouſals *de futuro* (by reaſon of carnal knowledge, or ſome other Act Equivalent) do become Matrimony; for in this Caſe, as

(*z*) c. requiſivit de Sponſal. extra.

(*a*) Henr. Boic. in d.c. requiſivit c. 1. de Sen. extra. lib. 6.

(*b*) *Imò non petenti impendenda eſt abſolutio pertinaci*, inquit Præpoſ. poſt Jo. And. in c. ex literis. el. 2. in fin. de Sponſal. extra.

(*c*) Panor. Præpoſ. & alij in d. c. requiſivit. Covar. tract. de Sponſ. 1. parte. c. 4. in princ. n. 5.

(*d*) c. 1. de Sponſ. duorum extra. Lindwood in c. 1. de pœnis. lib. 5. provincial. conſtitut. Cant. Fitzherbert na. br. fol. 43. d. Stat. Ed. 1. An. 13. nec. opus eſt interpoſitione Juramenti ad hanc pœnam infligend. Lindwood in d. c. 1. verb. fidei. Panor. in d.c. 1. de Sponſ. n. 3. Adde c. Jurament. 22. q. 5.

in

in the former, where Spousals be contracted *de præsenti*, the disobedient Party is to be *Excommunicated* (*e*), apprehended and imprisoned (*f*), nor to be absolved or released before satisfaction (*g*), or death, or other just Cause of divorce (*h*).

(*e*) c. 1. de Sponſ. duorum extra. & ibi DD.
(*f*) Lindwood. in c. de pœnis. verb. fidei transgressione. Fitzherbert Na. br. *in Brevi de Excommunicato capiendo*
(*g*) Lindwood, & Fitzherbert ubi supra. (*h*) Wesembec. in Tit. de Sponsal. ff. in fin.

28. Other effects there be of Spousals, whereof some respect the Issue or Children begotten before Celebration of the Marriage, betwixt those which have contracted Spousals; and some have relation to their Lands and Goods. Concerning their Issue, true it is, that by the Canon Law, the same is lawful (*i*): But by the Laws of this Realm their Issue is not lawful, though the Father and the Mother should *afterwards* celebrate Marriage in the face of the Church (*k*). Likewise concerning Lands by the Canon Law, the foresaid Issue may inherit the same (*l*); for further declaration whereof the Canonists tell us, how the Children of *Jacob* which he had by his Handmaids, did inherit the Land with their lawful Brethren (*m*), by reason *Jacob* did afterwards marry their Mothers (*n*): But it is otherwise by the Laws of this Realm, for as the Issue is not legitimated by subsequent Marriage, no more can he inherit his Fathers Land; and as he cannot inherit, no more is she to have any Dower of the same Lands; for whereas by the Laws of this Realm, a marryed Wife is to have the third part of her Husbands Lands, holden in Fee Simple or Fee Tail, either General or Special, for her Dower, after her Husbands Death, during her Life, So that she be above the Age of nine Years, at her Husbands Death (*o*); Yet a Woman having contracted Matrimo-

(*i*) c. per tuas. Qui filij sunt legitimi extra & Panor. super eod. c.n. 4. & Præpos. n. 7.
(*k*) Stat. Merton. c. 9. an 20. H. 3. Tract. de repub. Angl. pag. 103. prope fin. & pag. 104. circa princ.
(*l*) d. c. per tuas. qui fil. sunt legit. §. nos autem & ibi DD.
(*m*) c. recurrat. 32. q. 4. §. Juvenis.
(*n*) Gloss. in c. non omnis 32. q. 2. Jason consil. 234. post eandem gloss.
(*o*) Littleton. Tit. Dower. in princ.

ny, if the Man to whom she was betrothed dye before the Celebration of the Marriage, she cannot have any Dower of his Lands, because as yet, she is not his lawful Wife, at least to that effect (*p*): Indeed it was sometimes holden for Law within this Realm of *England*, that if a Man affianced to a Woman, did carnally know her, and then make a Feoffment to the same Woman of a piece of Land, and give her seizin thereof, and after that Marry her in the face of the Church; this Feoffment was void (*q*), as being made unto his own Wife, to whom he had given his Faith, and whom he had carnally known, he and she being both one Person in Law (*r*); which thing also is agreeable to the Civil Law, and to the Canon Law also, whereby the donations which are forbidden betwixt the Husband and Wife, are interpreted likewise to be forbidden betwixt them which have contracted Spousals *de præsenti*, or which having contracted Spousals *de futuro*, do afterwards lye together, whereby those Spousals are reputed Matrimony (*s*). But afterwards the Temporal Lawyers of this Realm were of another Opinion, than they were in former times: And whereas long ago, they did seem to hold that the Feoffment was not good, as being made to his own Wife (*t*), now they do hold that it is good, as being made, not unto his Wife, but unto a single Woman, and another Person in Law (*u*): But a single Woman cannot have any Dower, as aforesaid; and therefore a Woman contracted only to a Man, cannot have any dower of his Lands.

(*p*) M. 10. H. 3. Perkins. fol. 61.

(*q*) Perkins fol. 40. n. 195. Mich. 16. Ed. 3. 4. Feof. 117.

(*r*) Perkins ibidem.

(*s*) L. Scita. & L. cum hic status. §. penult. ff. *de donat. inter virum & uxorem.* Peckius de testam. Conjug. lib. 4. c. 11. n. 7. Bald. in L. solet. §. quæ virum. ff. de his qui no. infam. Panor. Præpos. & Felin. in Rub. de Spons. extra.

(*t*) Mich. 16. Ed. 3. 4. Perkins fol. 40. n. 195.

(*u*) Mich. 15. Ed. 4. 3. Perkins ubi supra.

29. Concerning Goods, the like may be said of them as hath already been spoken of Lands, that is to say, that although by the Civil and Canon Laws, where the

the Man doth gain any of the Womans Goods, or the Woman gain any of the Mans Goods, by reason of Marriage. Spousals *de præsenti* or *de futuro*, consummate with Carnal knowledge, have the same effect as hath Matrimony Solemnized (*x*); yet by the Laws of this Realm it is otherwise: So that neither Spousals *de præsenti*, neither Spousals *de futuro* consummate, do make her Goods his, or his Goods hers (*y*): And hence it is, that a Woman contracted in Matrimony, dying before the celebration of the Marriage, may make her Testament, and dispose of all her Goods, at her own pleasure (*z*), which after Solemnization of the Marriage she cannot do, without his license and Consent (*a*): And on the other side the Man dying intestate before Celebration of the Marriage, the Woman to whom he was betroathed surviving, cannot obtain the *Administration* of his Goods (*b*), as his Widow, which otherwise, the Marriage being Solemnized, she might do (*c*): And the like I read to be observed in divers other Countries, as in *France*, (*d*), and *Saxony* (*e*), where neither he, nor she gain any part of the others Goods by being affianced, unless the Marriage be solemnized, if not consummate also (*f*).

(*x*) Bar. in L. nihili interest. n. 1. ff. rer. amot. Castrens. in L. Si marito §. Si pater. n. 2. ff. Sol. Matr. Schurff. fil. 9. cent. 3. And. Gaillius q. 80. *ubi dicit hanc opinionem veriorem, & æquitati magis consentaneam, & in practicâ servand.*

(*y*) Tract. de repub. Angl. pag. 103. circa finem.

(*z*) Perkins fol. 40. 38. Ed. 3. 12.

(*a*) Lindwood. in c. Statut. verb. propriorum. lib. 3. provinc. constit. Cant. Bracton de Legib. & Consuetud. Angl. lib. 2. c. 26. Brook Abridgment. Tit. devise. n. 34. & in Tit. Testament n. 21.

(*b*) Vide Rebuff. in L. pronunciatum. ff. de verb. Signif. fol. 340. circa fin. & Wesenbec. in tit. de Sponsal. ff. n. 9.

(*c*) Stat. H. 8. an. 21. c. 5.

(*d*) Rebuff. in L. pronunciatum. ff. de verb. Sig. fol. 340.

(*e*) Wesenbec. in Tit. de Sponsal. ff. n. 9.

(*f*) *Jus autem Saxonicum non solum celebratæ nuptiæ, sed etiam Thori maritalis ingressum prorsus exigit.* Wesemb. ubi supra.

SECT. XVIII.

By what means Spousals are dissolved.

1. ALbeit Spousals *de præsenti* are as indissoluble as perfect Matrimony solemnized and consummate (*a*); yet there be divers Cases wherein Spousals *de futuro* either be dissolved *ipso Jure*, or at least may be dissolved *Sententia Judicis* (*b*).

(*a*) c. Si inter de Sponsal. extra. & ibi Cardinal. Panor. Præpos. & alij Moraldus tract. de Matrimonio, fol. 29.

(*b*) c. c. de Sponsal. extra.

2. The First Case is, when the Parties do *mutually* agree betwixt themselves to dissolve the Contract; for then they are not to be compelled to marry together, lest a worse thing happen unto them (*c*): Which conclusion is true, unless by lying together and knowing one another, or by some other æquivalent Act, the same Spousals were made Matrimony, before they did agree to dissolve the Contract, for then it is indissoluble (*d*).

(*c*) Eod. c. 2.

(*d*) c. Is qui de Sponsal. extra. & DD. ibidem Schneidwin. tract. de imp. fol. 20.

3. The Second Case is, when as a certain time is set down for the Marriage; for *that day* being past, the Spousals are dissolved (*e*); and that Party by whom it did not stand, wherefore the Contract was not performed, may marry elsewhere, without any danger; but the other Party which was in fault is punishable, *propter læsionem fidei* (*f*).

(*e*) c. sicut ex literis. cum ibi notat. de Sponsal. extra Melchior Kling. Tract. de Causis Matrimonial. fol. 6.

quod intellige nisi tempus apponatur ad implend', non ad finiend' obligationem, veluti quando dies apponitur ex post facto, Sponsalibus purè contractis. (*f*) Silvestr. Prier. in Summa verb. Sponsalia q. 10. versic. 5. per d.c. sicut ex literis.

4. The

4. The third Case is, when as the Party hath been long absent, that is to say *three Years*, without the Province (*g*), or *two Years* within the Province (*h*); for after lapse of so long time the other party may marry, but not in the mean time (*i*); and if the absence be necessary, and upon a just impediment, then longer expectation is necessary (*k*), unless the Ordinary, to avoid the peril of Fornication, grant *License* to marry with some other (*l*).

(*g*) L. secunda C. de repudijs c. de illis de Sponsal. extra. Covar. Tract. de Sponsal. 1. parte c. 5. n. 7.

(*h*) Lib. 2. C. de Sponsal. dd. in d. c. de illis.

(*i*) L. 2. de repud. L. 2. de Sponsal. C. c. de illis de Sponsal. extra.

(*k*) L. Sæpe ff. de Sponsal.

(*l*) Arg. c. ultim. de eo qui cogno. ux. Covar. tract. de Sponsal. 1. parte. c. 5. n. 7. Schneid. de nuptijs fol. 20.

5. The Fourth Case is, when as the Contract is conditional, and the Condition infringed (*m*); for the Condition being broken, the Bond is untyed, and the Parties at liberty to marry elsewhere (*n*); or when as the Party doth promise to give so much in Marriage, as afterwards he is not able to perform; In which Case the other Party is not bound to perform the Contract. (*o*),

(*m*) c. de illis de condic. appos. extra. Kling. de Caus. Matrimonial. fol. 6.

(*n*) d. c. de illis & ibi Panor. & alii.

(*o*) Prier. in Summa Silvestrin. verb. Sponsalia. q. 10. versic. nono. post Jo. And. in d. c. de illis. Covar. tract. de Sponsal. 1. parte. c. 5. n. 4. *quem velim videas.*

6. The Fifth Case is, when as the Spousals be contracted in minority; for the Minor coming to lawful Age may *dissent*, and so dissolve the Contract (*p*).

(*p*) c. de illis el. 1. de desponsi. impub. extra.

7. The Sixth, when as the Party doth after the Contract made, commit *Fornication*, for the Innocent Party is at liberty, and may dissolve the Contract (*q*); and so it is for Spiritual Fornication, that is to say, for *Heresie*, *Apostacy*, or *Infidelity* (*r*).

(*q*) cc. quemadmodum de Jure-jur. extra. *At Mæchus refilire non potest, Si modò Innocens velit secum contrahere.* c. 2. de transac. Prælat. Prier. verb. Sponsalia q. 10. vers. Septimo.

(*r*) Prier. ubi supra dd. in c. quemadmodum de Jure-Jur. extra. Melchior Kling. Tract. de causis Matrimonial. fol. 5. in fine. non solum 28. q. 1.

8. The

8. The Seventh is, when as the one Party doth happen to be infected with some *foul Disease*, as *Leprosy*, or the *French-pox*, or to be afflicted with some notable deformity, as the loss of her Nose, or her Eye, &c. for in this Case the other Party is not to be pressed to marry that Person, so diseased or deformed (*s*).

(*s*) de quemadmodum desponsatis. Jur. c. ultim. de Conjug. Leprosorum extra. *Quod verum est si post Contractum eveniat, secus si manifeste inierat tempore initi Contractus.* Prier. Silvestr. verb. Sponsal. q. 10. vers. sexto.

9. The Eighth is, when some deadly enmity and unquenchable *hatred* is sprung up between the Parties affianced; for in this Case also the Spousals may be dissolved (*t*).

(*t*) Summa Hostiens. tit. de Sponsal. §. qualiter. dissol. verb. Sin autem capitalis. Prier. ubi supra, versic. octavo.

10. The Ninth is, when as some *new affinity* doth arise betwixt the Parties betroathed, within the Degrees prohibited (*u*); for Example the Man after the Contract doth know her Sister, or the Woman doth lye with his Brother (*x*); for Affinity doth grow by carnal knowledge only (*y*): In which Case therefore, the Parties formerly betroathed may not marry (*z*).

(*u*) c. 2. c. fraternitati & c. ex literis de eo qui Cogno. Consang. ux. fuæ extra. Summa Hostiens. §. qualiter dissolvantur versic. Item tertio Sponsam 27. q. 2.

(*x*) Silvestr. Prier. verb. Sponsalia q. 10. versic. decimo c. Si quis

(*y*) *id quod verum est sane canonico etiamsi coitus sit illicitus.* c. discretionem. juncta glossa in verbo. nec affinitas. de eo qui cog. sang. ux. & ibi Pan. n. 6. & notat Host. in tit. de affinitat. Melch. Kling tract. de Matrimonio fol. 51.

(*z*) c. 2. c. fraternitatis & c. ex literis de eo qui cog. consang. ux. fuæ. Kling tract. de caus. Matrimonial. fol. 6. Henr. Boic. in c. de illis de Sponsal.

11. The Tenth is, when as there is a Fame or common report, That there is some lawful impediment betwixt the Parties contracted; in which Case for fear of Scandal they are to be admonished, to abstain from marrying (*a*); And if the impediment be lawfully proved,

(*a*) c. cum in tua de Sponsal. extra.

wed, then are they to be compelled to abstain (b).

(b) Panor. Præpos. & alii in d. c. cum in tua & in c. super eo de Consang. & affin. extra.

12. The Eleventh is, when the one Party is so severe and cruel as the other dare not proceed in the Match, for in this Case the Spousals may be dissolved (c).

(c) Panor. in c. veniens. qui Clerici vel voven. extra. Prier. verb. Sponsalia. q. 10. vers. decimo quinto.

13. The Twelfth Case is, when as one of the Parties contracted doth contract Spousals *de præsenti* with another Person: For by the second Spousals *de præsenti*, the former *de futuro* be dissolved (d), albeit they were confirmed with an *Oath* (e); and albeit the new espoused Party did before the Solemnization of the Marriage depart this Life; for the former Spousals once destroyed receive no force by the destruction of the second Spousals (f), unless those Spousals *de præsenti* were destroyed from the first beginning, that is to say, unlawful at the first; for unlawful Spousals *de præsenti* do not destroy, nor yet hurt the former lawful Spousals *de futuro* (g).

(d) c. is qui &c. Si inter de Sponsal. extra.
(e) Ibidem.
(f) Præpos. in c. sicut ex literis. de Sponsal. extra. n. 8.
(g) Præpos. in d. c. sicut. n. 9. facit c. non præstat. de Reg. Jur. 6.

14. Finally and generally whensoever there is just and reasonable Cause (h), (as there be a great many more Causes expressed in the Canon Law (i), of the lawfulness and reasonableness whereof I make some doubt, which is the Cause wherefore I have omitted them), Spousals *de futuro* may be dissolved (k); nor is either Party precisely to be compelled to the performance thereof against their Will, though otherwise they be punishable for their Contempt, as is before expressed, amongst the effects of Spousals.

(h) c. ex literis el. 2. de Sponsal. extra. Prier. verb. Sponsalia q. 10. vers. decimo Septimo.
(i) Clavas. in Summa Angelica verb. Sponsalia. & Prier. in Summa Silvestrin. eod. verb. *ubi enumeran-*

tur 17 Causæ dissolvendi Sponsalia, Quibus adde Henr. Boic. in c. de illis de Sponsal. extra. (k) d. c. ex literis el. 2. Melchior Kling. tract. de Caus. Matrimonial. fol. 3.

15. There

15. There is one thing yet remaining, which may not be omitted, and this it is; Where I said that Spousals *de futuro* are sometimes dissolved *ipso facto*, and sometimes to be dissolved by the *Sentence* of the Judge, In what Cases are they forthwith dissolved, or to be dissolved according to that distinction? Briefly in all Cases the Authority of the Church is requisite, unless the Contrary be expressed (*l*), as in that Case of second Spousals *de præsenti* (*m*), or of the certain *præfixed time* expired (*n*); for there they be dissolved *ipso facto*: Likewise when the Cause of dissolution is *notorious* (*o*), that is, known to a multitude (*p*); or when the Spousals be *Secret*, known to none but to themselves, then also they may be secretly released, without the Authority of the Church (*q*).

(*l*) Jo. And. & al. in c. de illis de Sponsal. extra Prier. verb. Sponsalia in fin. Covar. tract. de Sponsal. 1. parte. c. 5. n. 12.

(*m*) Henr. Boic. in d. c. de illis Melchior Kling tract. de Causis Matrimonial. fol. 6.

(*n*) Boic. & Kling ubi supra per c. sicut de Sponsa. extra.

(*o*) Silvester Prier. verb. Sponsalia q. 11.

(*p*) L. ea quidem. & Bald. ibidem C. de Accus.

(*q*) Prier. ubi supra. Summa Angelica verb. Sponsalia in fin.

FINIS.